LAW AND PRACTICE

RELATING TO

COUNTY COURT APPEALS:

MANDAMUS, PROHIBITION, AND CERTIORARI.

BY

DANIEL CHAMIER.

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BY

DANIEL CHAMIER,

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PREFACE.

THE form of Appeal by motion, which was introduced by the Act of 1875, and adopted by its successor of 1888, has not been found so simple and workable as had been anticipated from a procedure the avowed object of which was to cheapen and facilitate Appeals from County Courts.

On the one hand, no extension has, by these Acts, been conferred upon an aggrieved party of his right to question an adverse ruling; whilst, on the other, the observance of certain formalities has been imposed upon all litigants, which not infrequently results in an appeal being altogether frustrated by reason of some more or less excusable error or omission in mere procedure.

The following pages will, it is hoped, be found to present a fair statement of the procedure in County Court Appeals, so far as one

can be deduced from the Statute, the Rules, and the decisions, which, as will be observed, are not always so consistent with each other as to render it an easy task to abstract from them a series of rules of general applicability.

The subjects of Mandamus, Prohibition, and Certiorari have been treated in order to give effect to the design of the book, which is to comprise the procedure before Divisional Courts in the principal branches of appellate and corrective jurisdiction which they are empowered to exercise over inferior Courts.

D. C.

2, Garden Court, Temple.

Easter, 1896.

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THE

LAW AND PRACTICE

RELATING TO

COUNTY COURT APPEALS,

MANDAMUS, PROHIBITION AND CERTIORARI.

CHAPTER I.

HISTORY OF APPELLATE JURISDICTION OVER COUNTY COURTS.

County Courts Act, 1846.

The Act of 1846 (*a*), "for the more easy recovery of small debts and demands in England," which might be put in force, by Order in Council, in any county (though not in the City of London), did not extend the jurisdiction of the County Court beyond the 20*l.* limit which had at that time already been established; nor did it give the Court cognizance of any action of ejectment, or action in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market or franchise should be in question, or in which the validity of any demise, bequest or limitation under any will or settlement might be disputed, or for any malicious prosecution or libel or slander, or criminal conversation or seduction, or breach of promise of marriage (*b*).

By sect. 89, it was enacted that—"(1) Every order and judgment of any Court holden under this Act, except as herein provided, shall be final and conclusive between the parties; but (2) the judge shall, ... in every case whatever, have the power, if he shall think fit, to order a new trial to be had, (3) upon such terms as he shall think reasonable, and (4) in the meantime to stay the proceedings." And the next section prohibited actions from being removed into superior Courts except on certain conditions.

County Courts Act, 1849.

The finality of a County Court judge's order or judgment was not affected by the Act of 1849 (*c*), which, besides

(*a*) 9 & 10 Vict. c. 95.
(*b*) Sect. 58.
(*c*) 12 & 13 Vict. c. 101.

amending the former statute, abolished certain inferior Courts of Record.

County Courts Act, 1850.

But an appeal section found its place in the further amending Act of 1850 (*d*), which Act also extended the jurisdiction of County Courts from its former limit of 20*l.* to debts, damages, and demands not exceeding the sum of 50*l.*, and to all actions in respect thereof, save and excepting those set forth in the Act of 1846, and herein already referred to.

13 & 14 Vict. c. 61, s. 14.

Sect. 14, which gave the right of appeal, is the basis of a long series of decisions on various questions having relation to that right, many of which will be considered in due course.

It enacted that "If either party in any cause, of the amount to which jurisdiction is given to the County Courts by this Act, shall be dissatisfied with the determination or direction of the said Court (1) in point of law, or (2) upon the admission or rejection of any evidence, such party may appeal from the same to any of the Superior Courts," within a certain limit of time, and on giving notice and security for the costs and, if defendant, the amount of the judgment, "and the said Court of Appeal may either (1) order a new trial on such terms as it thinks fit; or (2) order judgment to be entered for either party, as the case may be, and may (3) make . . . order for costs, and (4) such orders shall be final."

S. 15.

By sect. 15 it was enacted that—"(1) Such appeal shall be in the form of a case agreed upon by both parties or their attorneys; (2) and if they cannot agree, the judge of the County Court, upon being applied to by them or their attorneys, shall settle the case and sign it; (3) and such case shall be transmitted by the appellant to the . . . . master's office of the Court in which the appeal is to be brought."

S. 16.

And no judgment, order or determination of a County Court judge, nor any cause or matter brought before him or pending in his Court, was to be removed by appeal, motion, writ of error, *certiorari* or otherwise, into any Court whatever, save and except in the manner and according to the provisions mentioned in these two sections (*e*).

S. 17.

In the event of their so agreeing, parties were empowered to extend the jurisdiction of the County Court, both as to the value of the debt, damage, or demand, and to its subject-matter (*f*); and in a case under this section it was held that where an extended jurisdiction had been so given by the

(*d*) 13 & 14 Vict. c. 61, s. 14.
(*e*) *Ibid.* s. 16.
(*f*) *Ibid.* s. 17, repealed by the Act of 1856.

parties, no appeal would lie (*g*). But the rule thus laid down was altered in the Act of 1854, as will be duly seen.

The mere form of procedure in appeals, as permitted by the Act of 1850, was somewhat modified in 1852 (*h*), whilst two years later, again (*i*), the right and mode of appeal as it then stood was extended to all cases in which jurisdiction was given by consent of the parties under the 17th section of the Act of 1850 (*k*); but since the latter section was itself repealed by the Act of 1856, the extension, of which it was the basis, may also be taken to have gone. 15 & 16 Vict. c. 54. 17 & 18 Vict. c. 17.

The amending Act of 1856 (*l*), again enabled parties to give jurisdiction by agreement signed by themselves or their attorneys, in which case the County Court could try all actions capable of being brought in any superior Court of common law, with the single exception of an action for criminal conversation. 19 & 20 Vict. c. 108, s. 23.

The Court, by sect. 24 (*m*), was also empowered to try actions in which the balance of a claim, after deduction by an admitted set-off, did not exceed 50*l.*; whilst, by sect. 25, the parties could, by written consent, signed by themselves or their attorneys at the hearing, give jurisdiction in any action in which the title to any corporeal or incorporeal hereditament, or to any toll, fair, market or franchise, should incidentally come in question, the judgment not being evidence of such title as between the parties or their privies in any other action in that Court, or any proceeding in any other Court. S. 24. S. 25.

Moreover, the consent given under sect. 25 was not to prejudice or affect any right of appeal by either of the parties in the action to which the question of title was incidental (*n*).

The appeal sections of this Act (*o*), sects. 68 and 69, are of an extending nature, and the Act, by sect. 3, incorporates the preceding Acts of 1846, 1849, 1850, and 1852, in so far as the latter are not inconsistent with it. They provide respectively that (sect. 68) "An appeal from the decision of a County S. 68.

(*g*) *Groves* v. *Janssens* (1854), 9 Ex. 481; 2 C. L. R. 558; 23 L. J. Ex. 91.
(*h*) 15 & 16 Vict. c. 54 (1852).
(*i*) 17 & 18 Vict. c. 17, s. 1 (1854).
(*k*) 13 & 14 Vict. c. 61 (1850).
(*l*) 19 & 20 Vict. c. 108, s. 23 (1856).
(*m*) 19 & 20 Vict. c. 108 (1856).
(*n*) Sect. 23, by which an extended jurisdiction might be given by consent in actions at common law, contained no proviso of this kind, but the rights of the parties to appeal in such circumstances seem to have been provided by the appeal section 68, which is set out in the text.
By sect. 26, a judge of the Superior Court might, in certain cases, order a cause to be tried in a County Court; but the action continued to be in the Superior Court, where judgment was ultimately signed.
(*o*) 19 & 20 Vict. c. 108 (1856).

Court on the same grounds, and subject to the same conditions, as are provided by the 14th section of the Act 13 & 14 Vict. c. 61 shall be allowed (1) in all actions of replevin where the amount of rent or damage exceeds 20*l.*, and (2) in all actions for the recovery of tenements where the yearly rent or value of the premises exceeds 20*l.*, and (3) in proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, exceeds 20*l.*, and (4) in all actions where the parties agree that the Court shall have jurisdiction" (*p*).

S. 69. Sect. 69.—"No appeal shall lie from the decision of a County Court if, before such decision is pronounced, both parties shall agree, in writing signed by themselves or their attorneys or agents, that the decision of the judge shall be final, and no such agreement shall require a stamp."

21 & 22 Vict. c. 74. 22 & 23 Vict. c. 57. The powers of litigants to appeal were not affected by the Act of 1858 (*q*), which simply rearranged the districts, or by the Act of 1859 (*r*), which limited the powers of imprisonment by a County Court judge for debt.

28 & 29 Vict. c. 99. The next statute (that of 1865 (*s*)) conferred upon County Courts a limited jurisdiction in equity, by virtue of which suits of various kinds, and in which the subject-matter did not exceed 500*l.* in value, could be tried, the 9th section providing for an extension of jurisdiction upon application of any party, and after hearing, or on default in appearance by the other.

S. 18. The appeal section (*t*) provided that—"If any party in a suit or matter under this Act shall be dissatisfied with the determination or direction of a judge of a County Court (1) on any matter of law or equity, (2) or on the admission or rejection of any evidence, such party may appeal from the same . . . . and the . . . . Court of Appeal may make such final or other decree or order as it shall think fit, and may also make such order with respect to the costs of the said appeal as the Court may think proper, and such orders shall be final, provided that nothing herein contained shall authorise any party to appeal against any decision of a County Court, given upon any question as to the value of any real or personal property for the purpose of determining the question of the jurisdiction of the Court under this Act, nor to

(*p*) That is, in cases where jurisdiction was given under sect. 23 of the same Act. (*Pearce* v. *Winkworth* (1873), 28 L. T. 710.)
(*q*) 21 & 22 Vict. c. 74 (1858).
(*r*) 22 & 23 Vict. c. 57 (1859).
(*s*) 28 & 29 Vict. c. 99 (1865).
(*t*) *Ibid.* s. 18.

appeal against the decision of a County Court on the ground that the proceedings might, or should, have been taken in any other County Court."

An Act regulating matters of administration was passed in 1866 (*u*), this being followed, in 1867, by a further amending Act (*x*), which, by sect. 34, was to be construed together with its predecessors of 1846, 1849, 1850, 1852, 1856, 1858, 1859, 1865, and 1866, except in so far as the latter were repealed by it. None of the then existing appeal sections were in terms repealed by this Act. 29 & 30 Vict. c. 14. 30 & 31 Vict. c. 142. S. 34.

By sect. 7, the High Court could order a cause to be tried in a County Court, in which case "the proceedings therein shall be heard and taken in such County Court as if the action had been originally commenced in such County Court"; and by sect. 8, proceedings in equity might be similarly transferred; but this section ended with the words, "and the parties thereto shall have the same right of appeal that they would have had, had the suit or proceeding been commenced in the County Court." S. 7. S. 8.

By sect. 10, actions for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort, might, in certain circumstances, be remitted from the High Court to a County Court for trial therein, when the County Court would have the same powers and jurisdiction as if obtained from both parties by consent, and as if the action had been commenced by plaint in the County Court. S. 10.

Actions of ejectment and of title were also brought within the jurisdiction of the County Courts, where the subject-matter did not exceed 20*l.* in value (*y*). Ss. 11, 12.

By sect. 13, an appeal was allowed "on the same grounds, and subject to the same conditions as are provided by sect. 14 of the Act 13 & 14 Vict. c. 61—(1) in all actions of ejectment; (2) in all actions in which the title to any corporeal or incorporeal hereditament shall come in question; (3) and, with the leave of the judge, ... in actions in which an appeal is not now allowed, if the judge shall think it reasonable and proper that such appeal should be allowed." S. 13.

The County Courts Act, 1875 (*z*), was also to be construed together with the Act of 1846, and the several Acts altering or amending it, as already hereinbefore set out, and sect. 6 made the following important alteration in the mode, though 38 & 39 Vict. c. 50.

(*u*) 29 & 30 Vict. c. 14 (1866).
(*x*) 30 & 31 Vict. c. 142 (1867).
(*y*) *Ibid.* ss. 11, 12.
(*z*) 38 & 39 Vict. c. 50 (1875).

S. 6 not in the right (*a*), of appeal :—"In any cause, suit or proceeding, other than a proceeding in bankruptcy, tried or heard in any County Court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision, by motion to the Court to which such appeal lies, instead of by special case, such motion to be *ex parte* in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings as to the Court to which such motion shall be made shall seem fit; and if the Court to which such appeal lies be not then sitting, such motion may be made before any judge of a superior Court sitting in chambers; and at the trial of any such cause, suit, or proceeding, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit or proceeding, and he shall, at the expense of any person or persons, being party or parties in any such cause, suit, or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons, and he shall sign such copy, and the copy so signed shall be used and received on such motion, and at the hearing of such appeal."

The history of the legislation conferring and regulating the right and mode of appeal from County Courts is completed by a consideration of the consolidating and amending Act of 1888 (*b*), and certain Orders of the Supreme Court and Rules of the Crown Office and of the County Court.

(*a*)——Per Lord Coleridge, L.C.J., in *Rhodes* v. *Liverpool Investment Co.* (1879), 4 C. P. D. 425.
Cousins v. *Lombard Bank* (1876), 1 Ex. D. 404; 45 L. J. C. P. 573; 35 L. T. 484; 25 W. R. 116.
Seymour v. *Coulson* (1880), 5 Q. B. D. 388; 49 L. J. Q. B. 604; 28 W. R. 664.

(*b*) 51 & 52 Vict. c. 43, ss. 120 *et seq.*

CHAPTER II.

THE STATUTE OF 1888.

By the statute of 1888, all the preceding Acts are repealed (*a*), and the whole law regulating the constitution of, and procedure in, County Courts consolidated and amended. 51 & 52 Vict. c. 43.

The ordinary jurisdiction of the Court is, by the 56th section, to extend to "all personal actions where the debt, demand, or damage claimed is not more than 50*l.*, whether on balance of account or otherwise." S. 56.

But the section ends with the proviso that—"Except as in this Act provided the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market or franchise shall be in question; or for any libel or slander; or for seduction; or for breach of promise of marriage."

The extent and meaning of the section and its proviso are elucidated in the succeeding sections, of which sect. 57 gives the Court jurisdiction where a claim has been reduced by set-off to 50*l.* S. 57.

Sect. 58 gives jurisdiction over a demand not exceeding 50*l.* in respect of "the unliquidated balance of a partnership account, or a distributive share under an intestacy, or of any legacy under a will." S. 58.

Sect. 59 gives jurisdiction in ejectment where "neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof," shall exceed the sum of 50*l.* by the year, subject to the right of the defendant to obtain an order from the High Court for the removal thither of the action, by showing that the title to lands and hereditaments of a greater annual value than 50*l.* would be affected by the decision in it. S. 59.

Sect. 60 gives jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question, where "neither the value . . . . . nor the rent payable in respect thereof" shall exceed the sum of 50*l.* per annum. S. 60.

(*a*) 51 & 52 Vict. c. 43, s. 188.

S. 61. By sect. 61, in any action in which there shall incidentally come into question the title to "any corporeal or incorporeal hereditament, or to any toll, fair, market or franchise, the judge shall have the power to decide the claim which it is the immediate object of the action to enforce, if both parties at the hearing shall consent in any writing, signed by them or their solicitors, to the judge having such power. But the judgment of the Court shall not be evidence of title between the parties or their privies in any other action or matter in that or in any other Court; and such consent shall not prejudice or affect any right of appeal of either of the parties to such first-mentioned action."

S. 64. By sect. 64, jurisdiction may be given by written consent of the parties in the case of "all actions assigned to the Queen's Bench Division," nothing being said about the subsequent right of appeal, and no limitation being, as a consequence, placed upon the general right of appeal in "any action or matter" which is given to "any party" by the appeal sections (*b*).

S. 65. Sect. 65 enables a judge of the High Court at any time to order an action to be tried in a County Court (*c*), where, in an action of contract, the claim indorsed on the writ does not exceed 100*l.*, or has been reduced by payment or an admitted set-off, or otherwise, to a sum not exceeding 100*l.*, in which case "the action, and all proceedings therein, shall be tried and taken in such Court as if the action had been originally commenced therein," which seems to justify the conclusion that the usual right and mode of appeal will in all such cases exist and apply (*d*).

S. 66. By sect. 66, actions of tort in the High Court may be remitted for trial before a County Court (*e*), when, again, "the action, and all proceedings therein, shall be tried and taken in such Court as if the action had originally been commenced therein."

Ss. 67, 68. Sects. 67 and 68 provide respectively an equitable jurisdiction and a means for transferring certain actions to the Chancery Division, when, in the latter case, "the whole of the procedure in the said action or matter, when so transferred, shall be regulated by the Rules of the Supreme Court" (*f*).

S. 69. By sect. 69, any action or matter pending in the Chancery Division may be transferred to a County Court, when "the

(*b*) Sects. 120 *et seq.*: *vide infra.*
(*c*) See also C. C. R. Ord. XXXIII. rr. 1 *et seq.*
(*d*) See also R. S. C. Ord. LIX. r. 18.
(*e*) See also C. C. R. Ord. XXXIII. rr. 1 *et seq.*
(*f*) *Ibid.* rr. 5 *et seq.*

parties thereto shall have the same right of appeal as they would have had if the action or matter had been commenced in such Court" (*g*).

And by sect. 114 it seems possible for the parties to any action or matter commenced in a County Court over which it has no jurisdiction, to give the Court jurisdiction by consent. S. 114.

The appeal sections of the County Courts Act, 1888 (*h*), commence with sect. 120, which provides as follows (*i*) :—"If any party in (1) any action, (2) or matter, shall be dissatisfied with the determination or direction of the judge (1) in point of law, (2) or equity, (3) or upon the admission or rejection of any evidence, the party aggrieved by the (1) judgment, (2) direction, (3) decision, or (4) order of the judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior Courts to the High Court (*ii*) : Provided always that there shall be no appeal in any action of (1) contract, (2) or tort, other than an action of ejectment, or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage does not exceed 20*l.*, nor in any action of (3) replevin, where the amount of rent or the goods seized does not exceed 20*l.*; nor in any action for the (4) recovery of tenements, where the yearly rent or value of the premises does not exceed 20*l.*; nor in (5) proceedings in interpleader, where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed 20*l.*, unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall (6) grant leave to appeal." S. 120. General grounds of appeal in the section. Limitations. Except by leave.

At the trial or hearing of any action or matter in which there is a right of appeal, the judge, at the request of either party, shall "make a note of—(1) any question of law raised at such trial or hearing, and of (2) the facts in evidence in relation thereto, and of (3) his decision thereon, and of (4) his decision of the action or matter." Judge's note.

Sect. 121 provides that "in any action or matter in which there is a right of appeal, and the judge has, at the request of either party, made a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter, he shall, at the expense of any person or S. 121.

(*g*) *Ibid.* rr. 1 *et seq.*
(*h*) 51 & 52 Vict. c. 43.
(*i*) The numbers in parantheses have been inserted to emphasize the different portions of the section.
(*ii*) R. S. C. Ord. LIX. rr. 1 *et seq.*

persons being party or parties in any such action or matter, furnish a copy of the note so taken at the said trial or hearing, or allow a copy to be taken of the same, by or on behalf of such person or persons; and he shall sign such copy, whether a notice of motion in the matter of the said appeal has been served or not, and the copy so signed shall be used at the hearing of such appeal."

S. 122. By sect. 122:—"On the hearing of an appeal (*j*), the High Court shall have power to draw any inference of fact, and may either order a new trial on such terms as the Court may think just (*k*); or may order judgment to be entered for any party, as the case may be (*l*); or may make a final or other order on such terms as the High Court may think proper to ensure the determination on the merits of the real questions in controversy between the parties."

S. 123. Parties may, however, agree not to appeal, sect. 123 providing that "No appeal shall lie from the decision of the judge, if, before such decision is pronounced, the parties shall agree, in writing signed by themselves or their solicitors or agents, that his decision shall be final, and no such agreement shall require a stamp."

S. 124. Sect. 124 prohibits any judgment or order of any judge, or any action or matter brought before him or pending in his Court, from being removed by appeal, motion, *certiorari*, or otherwise, into any other Court whatever, save and except in the manner and according to the provisions mentioned in the Act.

Statutory grounds of appeal tabulated.

The rights of appeal, then, as given to an aggrieved party by the terms of the statute, in any action or matter, may be tabulated thus:—

(1) Any party
(2) in any action or matter,

may appeal against the County Court judge's

(1) judgment,
(2) direction,
(3) decision, or
(4) order,
(5) in point of law or equity,

as follows:—

A.—In contract or tort; debt or damage over 20*l.*

B.—In ejectment or title; value immaterial.

C.—In replevin; rent or damage, or goods seized, over 20*l.*

(*j*) See C. C. R. Ord. XXXII. rr. 1, 2.
(*k*) *Ibid.* r. 3.
(*l*) *Ibid.* r. 4.

D.—In recovery of tenements; yearly value over 20*l.*

E.—In interpleader; money, goods, or proceeds, over 20*l.*

F.—On the admission or rejection of any evidence.

G.—In equity; value immaterial.

H.—In every case by leave; value immaterial.

I.—In any action or matter (if any) not herein specifically excepted, limited, or curtailed; value immaterial.

The right.

And from these grounds it is deducible that the right of appeal is a general one on any point of law or equity in all actions or matters that can come before a County Court judge, such right being curtailed only by the specific limitations contained in the section as to the subject-matter and value of claims in certain actions or matters.

The mode.

The mode of appeal is separately regulated by the statute, which provides, firstly, that the judge shall make a note at the request of either party; and, secondly, that in any action or matter in which there is a right of appeal, and the judge has so made a note, a copy of it shall be used at the hearing of such appeal.

CHAPTER III.

APPEAL MUST BE ON A POINT OF LAW AND NOT OF FACT.

No appeal on decision of fact.

THE Appellate Court has no power to review the decision of a County Court judge upon a question of fact (*a*), the words in the appeal section of the Act of 1850 (*b*), which gave a right of appeal to a party dissatisfied with the determination or direction of a County Court in point of law, or upon the admission or rejection of any evidence, excluding an appeal as to matters of fact. The Act of 1875 (*c*), as already seen (*d*), merely introduced a new mode of procedure in cases where the right of appeal already existed, the Act of 1888, whilst extending the right of appeal to any "action or matter," and to "a point of law or equity," not differing in effect from its predecessor, in relation to the right to appeal against a decision of fact. The decision of Cleasby, B., and Grove, J. (*e*), therefore still applies, as well as the remark of the latter learned judge, that if appeals were allowed on questions of fact, the object of the legislature in establishing County Courts as cheap and expeditious tribunals would be defeated. The appeal sections created no jurisdiction to interfere with the finding of a jury, nor, in consequence, with that of a judge (sitting as a jury).

This decision, however, only affected appeals arising within the common law jurisdiction of County Courts, and not their equitable or Admiralty jurisdiction, appeals in suits within which might or might not extend to matters of fact. With

(*a*)——*Cousins* v. *Lombard Bank* (1876), 1 Ex. D. 404; 45 L. J. C. P. 573; 35 L. T. 484; 25 W. R. 116.
Brittain v. *Kinnaird* (1819), 1 B. & B. 432; 4 Moore, 50; Gow, 164.
Clarkson v. *Musgrave* (1882), 9 Q. B. D. 386; 51 L. J. Q. B. 525; 31 W. R. 47.

(*b*) 13 & 14 Vict. c. 61, s. 14.

(*c*) 38 & 39 Vict. c. 50, s. 6.

(*d*)——*Seymour* v. *Coulson* (1880), 5 Q. B. D. 359; 49 L. J. Q. B. 604; 28 W. R. 664.
Rhodes v. *Liverpool Investment Co.* (1879), 4 C. P. D. 425.
Cousins v. *Lombard Bank* (1876), 1 Ex. D. 404; 45 L. J. C. P. 573; 35 L. T. 484; 25 W. R. 116.

(*e*) In *Cousins* v. *Lombard Bank*, *ubi sup.*

this, Field, J. (in the same case) agreed, citing *Sharrock* v. *L. & N. W. Rail. Co.* (*f*), where both the Common Pleas Division and the Court of Appeal held that no appeal lay upon questions of fact under the Act of 1850.

As put by Maule, J., in 1851 (*g*), the convenient construction of sect. 14 of the Act of 1850 (*h*) would seem to be, that an appeal lies not in any case where the County Court judge performs the functions of a jury. In such a case his judgment upon a matter of fact cannot be the subject of review in any superior Court, though it might be in the case of a determination or direction of the judge in point of law, or in the case of an improper admission or rejection of evidence.

This view was recently upheld by the Court of Appeal (*i*), where the principle was recognized that where a case tried by a judge without a jury comes before the Court of Appeal, that Court will presume that the decision of the judge on the facts was right, and will not disturb it unless the appellant satisfactorily makes out that it was wrong.

So where a case involves facts, and what law there is in it is inextricably mixed up with the facts, it was never intended by the legislature that there should be an appeal (*k*). Where a judge states a number of facts and draws a conclusion from them, even if it could be seen most clearly that he has mistaken or misapplied the law, Maule, J. (*l*), did not consider it a proper subject of appeal.

But questions of fact and questions of law are not always easily to be distinguished, and Vice-Chancellor Stuart held (*m*) that the question whether certain conversations amount in equity to a contract between the parties to them is not a mere question of fact, but is one the decision of which by a County Court judge may be made the subject of appeal. In such a case the judge should send up all the evidence adduced at the hearing before him.

But where a question with reference to a contract or alleged contract between two parties to a suit is, *e.g.*, whether a certain signature to the contract is or is not a forgery, or the like, the question is one of fact (*n*).

(*f*) (1875), 1 C. P. D. 70; 33 L. T. 341; 24 W. R. 346.
(*g*) *East Anglian Rail. Co.* v. *Lythgoe* (1851), 10 C. B. 726; 2 L. M. & P. 221; 20 L. J. C. P. 84; 15 Jur. 400.
(*h*) 13 & 14 Vict. c. 61.
(*i*) *Colonial Securities Trust Co.* v. *Massey*, (1896) 1 Q. B. 38.
(*k*) Per Maule, J., in *East Anglian Rail. Co.* v. *Lythgoe*, *ubi sup.* at p. 736.
(*l*) In *East Anglian Rail. Co.* v. *Lythgoe*, *ubi sup.*
(*m*) *Williams* v. *Williams* (1868), 37 L. J. Ch. 854.
(*n*) Per Stuart, V.-C., in *Williams* v. *Williams*, *ubi sup.*

Similarly, an appeal was held to lie against the decision of the County Court judge (under the Act of 1850), though the question presented to the appellate Court be a mixed question of law and fact, provided the Court can clearly see that, in coming to the conclusion he did, the judge of the County Court must have taken an erroneous view of the law (*o*). In the case cited Maule, J., delivering the judgment of the appellate Court, held that the terms of a certain letter were not a sufficient acknowledgment of a debt to take the case out of the Statute of Limitations, the County Court judge having held otherwise.

The incidence of sheriff's charges subsequent to an interpleader order was held to be a matter of law, and a proper subject of appeal from a County Court under the Act of 1850 (*p*).

In following this rule on a later occasion, Maule, J., said:—"No doubt, if it could have been made to appear by any inference of fact that could legitimately be drawn from the evidence submitted to us, that the judgment of the County Court might be as it is, without any miscarriage in point of law on the part of the judge, that judgment must be left undisturbed, notwithstanding this Court might incline to draw inferences from the facts which might not consist with the conclusion which he has come to. But we feel no difficulty whatever in saying that, drawing any inferences that could legitimately be drawn from the evidence here set forth, the judgment for the respondent could not have been arrived at without error in point of law; that is to say, that the judge, ... in holding the appellant liable in point of law, ... must necessarily have been wrong." And the judgment was accordingly reversed (*q*).

And just as the appellate Court will be always disinclined to disturb a County Court judge's finding as to facts, where he has not come to such a decision the better course is to refer the matter back to the County Court, and have the evidence taken before a jury, that a verdict may be found on the facts (*r*).

(*o*) *Cawley* v. *Furnell* (1852), 12 C. B. 291; 20 L. J. C. P. 197; 15 Jur. 908.
(*p*) *Goodman* v. *Blake* (1887), 19 Q. B. D. 77; 57 L. T. 494.
(*q*) *Cuthbertson* v. *Parsons* (1852), 12 C. B. 304; 21 L. J. C. P. 165; 16 Jur. 860.
(*r*) *Booth* v. *Turle* (1873), L. R. 16 Eq. 182; 21 W. R. 721.

CHAPTER IV.

THE POINT OF LAW APPEALED AGAINST MUST HAVE BEEN TAKEN AT THE TRIAL.

Point of law must be taken at the trial.

It has always been a condition precedent to the right of appeal, both under the Act of 1875 and that of 1888 (*a*), that the question of law upon which it is desired to appeal should have been raised before the County Court judge at the trial (*b*).

Clarkson v. *Musgrave* (1882), and cases there reviewed.

Mr. Justice Field said, in the case last cited :—"Before the passing of the County Courts Act, 1875, the only mode of appealing was by a case stated by the judge, and the appeal did not lie upon any question of fact. It was thought necessary to give suitors a right of appeal not depending entirely upon the judge's discretion, and the Legislature therefore gave the remedy by sect. 6 of the County Courts Act, 1875. But the appeal given by that section is limited, as the appeal was before, to questions of law, and it must be brought by a person 'aggrieved by the ruling, order, direction, or decision of the judge.'"

After referring to that part of the section which provides for a note to be taken, the learned judge proceeded :—"I am clearly of opinion that every question of law upon which it is desired to appeal must be raised at the trial. Unless it is, there is no 'ruling, order, direction, or decision of the judge' within sect. 6 upon which to appeal. In actions in the High Court, where evidence is tendered at the trial and admitted without objection, so that there has been no ruling of the judge with respect to its admissibility, the rule is invariable that the admissibility cannot be questioned on appeal.

"The object of the provisions of sect. 6 is clearly to let the opponent of the party who asks for the note to be taken know

(*a*)——*Smith* v. *Baker*, (1891) A. C. 325; 60 L. J. Q. B. 683; 65 L. T. 467; 55 J. P. 660. See also *Williams* v. *Evans* (1875), L. R. 19 Eq. 547; 44 L. J. Ch. 319; 32 L. T. 359; 23 W. R. 466.
Watson v. *Ambergate, &c. Co.* (1851), 15 Jur. 448.

(*b*) *Clarkson* v. *Musgrave* (1882), 9 Q. B. D. 386; 51 L. J. Q. B. 525; 31 W. R. 47.

Clarkson v. *Musgrave* —contd.

what the question of law is, and to give him the opportunity of meeting it by necessary evidence. The judge must be asked to decide the question of law, and it is of great importance that he should be asked to take a note of the evidence relating thereto, both in the interest of the opponent and in order that this Court on appeal should have a complete and clear record of what the point raised at the trial was, and of the judge's decision upon it.

"I should therefore be prepared to decide on principle that no appeal lies under sect. 6, except against the decision of the judge upon a point of law taken at the trial.

"But the case of *Rhodes* v. *Liverpool Com. Inv. Co.* (*c*) is, I think, a decisive authority in favour of my view. It is said that the decision in that case has been, in effect, reversed by *Seymour* v. *Coulson* (*d*). I do not think so. On reading the judgments of the Court of Appeal in the latter case, I find that every judge expressly guards himself against being supposed to hold that it was not necessary to take the point before the County Court judge. In that case the questions of law were raised, and the judge did take a note of the evidence, though he was not requested so to do, and stated the questions of law on his note. The Court of Appeal held that the mere fact of his not having been asked to take a note did not destroy the right of appeal.

"I agree with that decision, and I think it would be a hard construction of the Act not to allow an appeal under these circumstances.

"In the present case, the point that there was no evidence for the jury was never raised or suggested to the judge at the trial. I am of opinion, therefore, that *Rhodes* v. *Com. Inv. Co.* (*e*) is an authority which stands untouched by *Seymour* v. *Coulson* (*f*) or *Morgan* v. *Rees* (*g*), for the proposition that a question of law upon which it is desired to appeal, under sect. 6 of the County Courts Act, 1875, must be taken before the County Court judge at the trial."

Mr. Justice Cave agreed that it would be wholly contrary to the principle of the Act to raise upon appeal an entirely distinct question of law to that which was taken, and of which the other side had no notice, at the trial. All the cases, including *Seymour* v. *Coulson*, recognize this, at least,

(*c*) (1879), 4 C. P. D. 425.
(*d*) (1880), 5 Q. B. D. 359; 49 L. J. Q. B. 604; 28 W. R. 664.
(*e*) *Ubi sup.* (note *c*).
(*f*) *Ubi sup.* (note *d*).
(*g*) (1881), 6 Q. B. D. 508; 50 L. J. Q. B. 491; 44 L. T. 133; 29 W. R. 345.

that the point must be taken at the trial, when it might be cured by evidence, and ought not to be taken for the first time on appeal upon notes sent up to this Court for the purpose of raising another and a distinct point of law. *Clarkson* v. *Musgrave* —contd.

The case of *Clarkson* v. *Musgrave* was approved in the House of Lords (*h*), Lord Halsbury, L.C., laying it down that only a limited appeal is allowed by law in actions originally tried in a County Court, no tribunal having power to review a decision of fact there arrived at, except the County Court itself. A matter of law might be made the subject of appeal, but only where the point has been raised at the trial. That, said the Lord Chancellor, had been decided in *Rhodes* v. *Liverpool Com. Inv. Co.* (*i*). In *Seymour* v. *Coulson* (*k*), the principle was affirmed that the point of law must be taken; and, finally, in *Clarkson* v. *Musgrave* (*l*), where all the cases were reviewed, it was established and, as the learned Lord Chancellor thought, had been accepted ever since, that the raising of the point of law at the trial is a condition precedent to any appeal from the decision of the County Court. There were good reasons, he thought, for the enactment which has so limited an appeal, and, in truth, even where written pleadings rendered such precautions as the statute had enforced in the County Court less necessary, the same precaution had been constantly enforced where applications for a new trial had been made in the Superior Courts. It was obvious that it would be unjust to one of the parties if the other could lie by and afterwards, having failed on the contention that he in fact set up, be permitted to rely on some other point not suggested at the trial, but which, if it had been suggested, might have been answered by evidence. *Smith* v. *Baker* (1891).

Lord Herschell agreed that it would be very mischievous if an appeal from a decision of a County Court could be sustained on the ground that there was no evidence to go to the jury when that point had not been raised before the County Court judge.

In *Rhodes* v. *Liv. Com. Inv. Co.* (*m*), Lord Coleridge, L.C.J., said it was clear by the very terms of it that the statute 13 & 14 Vict. c. 61, s. 14, did not give an appeal from the County Court on matters of fact; that is, where the judge *Rhodes* v. *Liv. Com. Inv. Co.* (1879).

(*h*) *Smith* v. *Baker*, (1891) A. C. 325; 60 L. J. Q. B. 683; 65 L. T. 467; 55 J. P. 660.
(*i*) (1879), 4 C. P. D. 425.
(*k*) (1880), 5 Q. B. D. 359; 49 L. J. Q. B. 604; 28 W. R. 664.
(*l*) (1882), 9 Q. B. D. 386; 51 L. J. Q. B. 525; 31 W. R. 47.
(*m*) (1879), 4 C. P. D. 425.

Rhodes v. *Liv. Com. Inv. Co.* (1879) —contd.

gives what the learned judges in *Cousins* v. *Lombard Bank* (*n*) called a verdict; but when he pronounces a decision on a case where both law and fact are submitted to him—if the parties choose, as they have a right to do, to forego a jury—the legislature has said that there should be an appeal in the mode provided. In that case, this procedure had not been followed. The case had come before the judge for determination on the true effect of certain undisputed facts which were in evidence, and at the end of the plaintiffs' case, the advocate for the defendants did not submit that no case had been made out against them and ask for a non-suit, but he proceeded to argue on the facts; nor did he ask the judge to take a note of "any question of law raised at such trial or hearing and of the facts in evidence in relation thereto." The motion by way of appeal was refused, on the authority of *Cousins* v. *Lombard Bank* (*o*), the course of procedure prescribed by the Act not having been followed; Grove, J., agreeing, and adding that the object of the Act was to prevent that which would work manifest injustice, namely, persons taking their chance of the decision of the County Court judge being in their favour, and afterwards, on finding the decision against them, taking advantage of a mistake in some point of law to which the attention of the judge had never been called. The Court further held, that after an appeal by motion had been rejected, for the reasons stated, a rule calling on the County Court judge to state and sign a special case under 13 & 14 Vict. c. 61, s. 15, would not be granted.

No case after appeal by motion.

G. E. R. v. *Giddons* (1880).

Yorke v. *Smith* (1851).

So, in *Great E. Rail. Co.* v. *Giddons* (*p*), the Court refused to hear the appeal on the ground that the judge's note did not show that the question of law had been raised at the trial; and, in *Yorke* v. *Smith* (*q*), the Court declined to entertain an objection as a ground of appeal which had not been taken in the Court below.

G. W. R. v. *Rimell* (1856).

But where, at the close of plaintiff's case in the County Court, the defendants' submission that there was no evidence to go to the jury was overruled by the judge, and the defendants thereupon called evidence, it was held, on appeal, that by so doing the defendants had not precluded themselves from appealing on the ground that the judge had ruled

(*n*) (1876), 1 Ex. D. 404; 45 L. J. C. P. 573; 35 L. T. 484; 25 W. R. 116.
(*o*) *Ubi sup.*
(*p*) (1880), 44 J. P. 284.
(*q*) (1851), per Coleridge and Erle, JJ., 21 L. J. Q. B. 53; 16 Jur. 63.

erroneously (*r*). And a Divisional Court held, in 1890, that on appeal against an order for a new trial, counsel for defendant could contend that there was no evidence of negligence, and that the judge was wrong in leaving the case to the jury, though that point had not been raised at the trial before the County Court judge. Lord Coleridge adopted the rule that the Court exceeded their jurisdiction if they set aside a verdict simply upon the ground that they were dissatisfied with the result of the trial, unless they could say that the verdict was such as no reasonable men could have come to. The County Court judge is within his authority in granting a new trial when the verdict is one that no reasonable men could have given (*s*). *Gardner* v. *Ingram* (1890).

The fact that a point does not appear from the judge's note to have been specifically taken at the trial is not material, if it appears that the judge necessarily decided that point in order to arrive at his conclusion; and the appellate Court may review his opinion on that point whether or not it was taken in argument before him (*s*).

(*r*) *G. W. R.* v. *Rimell* (1856), per Jervis, C. J., and Cresswell, Williams and Willes, JJ., 18 C. B. 575; 27 L. J. C. P. 201.

(*s*)——Per Lord Coleridge, C. J., in *Gardner* v. *Ingram* (1890), 61 L. T. 729, at p. 730; 54 J. P. 311, following *Seymour* v. *Coulson* (1880), 5 Q. B. D. 359; 49 L. J. Q. B. 604; 28 W. R. 664.

CHAPTER V.

THE JUDGE'S NOTE, AND OTHER MATERIAL FOR HEARING APPEALS.

Acts of 1875 and 1888 compared.

WHILST considering the cases relating to the judge's note, it should be borne in mind that the following, which seem to be the effective words, are common to both the Acts of 1875 and 1888:—

> "At the trial . . . the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the . . . [action or matter]."

So that the cases decided under the earlier Act will still apply.

Principles deduced from the cases.

It is believed that the following rules relating to the judge's note are supported by the cases which are subsequently cited and considered:—

Rule 1.—The statute having substituted the procedure on appeal by motion based upon the judge's note for the former procedure by special case, the appellate Court will, on grounds both of policy and convenience, though not of absolute necessity, insist, as a general rule of practice, upon the production of such a note at the hearing of an appeal, so that definite and adequate particulars may be before the Court for its assistance and guidance as to what took place in the Court below, and upon what the appeal is based (*a*).

Rule 2. — Neither the production of a judge's note, nor a request (*b*) by the party aggrieved for a note to

(*a*)——*Rhodes* v. *Liverpool Investment Co.* (1879), 4 C. P. D. 425; see p. 22, *infra*.
Per Hawkins, J., in *Cook* v. *Gordon* (1892), 61 L. J. Q. B. 445; and see p. 25, *infra*.
Clarkson v. *Musgrave* (1882), 9 Q. B. D. 386; 51 L. J. Q. B. 525; 31 W. R. 47, judgment of Field, J.; and see p. 15, *supra*.

(*b*)——*Seymour* v. *Coulson* (1880), 5 Q. B. D. 358; 49 L. J. Q. B. 604; 28 W. R. 664—C. A.; see p. 27, *infra*.
Clarkson v. *Musgrave* (1882), 9 Q. B. D. 386; 51 L. J. Q. B. 525; 31 W. R. 47, per Field, J.; and see p. 16, *supra*.

be taken, is a condition precedent to the right of appeal, either by the terms of the statute or rules (*c*), or as a result of the decisions, or according to the practice adopted by Divisional Courts (*d*); inasmuch as the statute first gives the right, and then directs the procedure, and places the obligation, not upon the aggrieved party to request that a note should be taken, but upon the judge to make it if so requested; whilst Ord. LIX. r. 8, already cited, gives the appellate Court power, in terms, to hear the appeal on other evidence when the judge's notes are not produced. Appeals may be, and are, in practice, heard where no note is produced, upon sufficient reason being shown, by affidavit, to account for its absence, and on verification of some statement or certificate of facts found (*e*), or report (*f*) for use in substitution thereof. Such affidavit should specifically state (*g*) that the missing note either was not taken, or has been lost; or it should give some other good reason for, or explanation of, its non-production.

Rule 3.—The fact that a note has been made by the judge without previous request from a party, is immaterial, and will not prevent it from being used as the basis of an appeal. It is enough that it exists in fact (*gg*), and fully and adequately sets forth the matter upon which the appeal is brought;—the corollary to which is that the County Court judge may compile or add to (*h*) a note after the trial, either from memoranda made during its progress, or from affidavits that were put in evidence (*i*), or from memory.

Rule 4.—A general request to take a note, made to the judge at the commencement of the trial, is not a sufficient request within the meaning of the Act (*k*); but the request

(*c*)——*Morgan* v. *Davies* (1878), 3 C. P. D. 260; 39 L. T. 60; 26 W. R. 816; see p. 22, *infra*.
Morgan v. *Rees* (1881), 6 Q. B. D. 508; 50 L. J. Q. B. 491; 44 L. T. 133; 29 W. R. 345; and see p. 23, *infra*.
(*d*) *James* v. *Evans* (1895), Law Journal Newspaper, Feb. 9, p. 88; and see p. 25, *infra*; dissenting from Wills, J., in *Cook* v. *Gordon*, *ubi sup.*
(*e*)——Per Hawkins, J., in *Cook* v. *Gordon* (1892), 61 L. J. Q. B. 445; and see p. 25, *infra*.
Also per Cave and Wright, JJ., in *R.* v. *Kerr* (1894), 70 L. T. 595; 10 T. L. R. 381; and see p. 26, *infra*.
(*f*) *Barber* v. *Burt*, (1894) 2 Q. B. D. 437; 10 R. 397; 63 L. J. Q. B. 701; 71 L. T. 295; 42 W. R. 572; see p. 26, *infra*.
(*g*)——*Brown* v. *Book* (1892), 8 T. L. R. 227; and see p. 24, *infra*. Also *Lumb* v. *Teal* (1889), 22 Q. B. D. 695; 58 L. J. Q. B. 298; 60 L. T. 451; and see p. 29, *infra*.
(*gg*) *Seymour* v. *Coulson* (1880), *vide* note (*b*), p. 20.
(*h*) *G. E. R.* v. *Giddons* (1880), 44 J. P. 284; and see p. 23, *infra*.
(*i*) *Hill* v. *Perssée* (1877), 25 W. R. 275; see p. 22, *infra*.
(*k*) *R.* v. *Kerr* (1894), 70 L. T. 595; 10 T. L. R. 381; and see p. 26, *infra*.

should be made when the point of law actually arises (*l*), and before the trial comes to an end, though not necessarily before judgment is given (*m*).

The cases considered.

Hill v. *Perssée* (1877).

In *Hill* v. *Perssée* (*n*), an appeal was heard by Mellor and Lush, JJ., on notes compiled by the County Court judge after the trial, from evidence wholly on affidavit, no request having been made for a note to be taken during the trial.

Morgan v. *Davies* (1878).

The case of *Morgan* v. *Davies* (*o*) was heard on appeal without a judge's note, it being explained that efforts had been made to obtain one, but the judge had declined to supply a copy of the note he had taken at the trial, on the ground that it was not such as was contemplated by the Act. Grove, J., acted upon the Rule of January 22nd, 1877, and ordered the appeal to be heard without the note, pointing out that the Rule did not make its production an absolute condition of the party's right of appeal, by reason of the proviso "unless otherwise ordered" (*p*).

Rhodes v. *Liverpool Investment Co.* (1879).

In the case of *Rhodes* v. *Liverpool Investment Company* (1879) (*q*), Lord Coleridge, C.J., said that by the mode of appeal provided by the Act (of 1875), the party objecting to the ruling or decision of the County Court judge must distinctly ask him to take a note, upon which the Court above might safely act when the case came to be there discussed. And Grove, J., added that the section, which introduced a new mode of procedure, superadded a requirement that the judge should at the hearing, if asked, take a note. The fact that the former practice of appeal by special case was abolished by this Act, and the new mode substituted therefor, would seem to leave little room for doubt as to the intention of the legislature to provide a definite and adequate means whereby the particulars formerly set forth with such precision by the special case should be brought before the appellate Court for its assistance and guidance on the hearing of the appeal.

In this case, the judge, who heard it without a jury, had actually taken a note of the evidence, though he had not been required to make a note of any question of law or of the

(*l*) *Morgan* v. *Rees* (1881), 6 Q. B. D. 508; 50 L. J. Q. B. 491; 44 L. T. 133; 29 W. R. 345; and see p. 23, *infra*.

(*m*) *Pierpoint* v. *Cartwright* (1880), 5 C. P. D. 139; 42 L. T. 259; 28 W. R. 583; and see p. 23, *infra*.

(*n*) (1877), 25 W. R. 275.

(*o*) (1878), 3 C. P. D. 260; 39 L. T. 60; 26 W. R. 816.

(*p*) The Rule in question ordered that no motions under the County Courts Act, 1875, s. 6 (see *supra*, p. 20), should be made from any County Court, unless a copy of the judge's notes, signed by the judge, should have been handed to the proper officer in Court, unless otherwise ordered. (See now Ord. LIX. r. 8; and *supra*, Proposition 2.)

(*q*) (1879), 4 C. P. D. 425.

evidence relating to it; and it was held that the unsuccessful party could not appeal, though he had applied for the judge's note immediately after the judgment, and his ground of appeal was that there was no evidence to warrant the decision of the judge.

Pierpoint v. *Cartwright* (1880).

The words, "at the trial," must be taken to mean before the trial has substantially come to an end; that is, before the case is fairly concluded, and after due opportunity for a party to raise his point. The whole object of the section is to prevent parties from taking the point after the case has been concluded, and after reflection upon it. An application made an hour and a half afterwards, for instance, would be wholly too late. But if, immediately upon the judge finishing his judgment, the objection be taken, so that his mind may be directed to it, he can then be asked to take a note of the point (*r*).

Mr. Justice Lindley, in the same case, said the remedy afforded to litigants by the Act of 1875 was a cheaper and simpler one than the appeal by special case. If, when a judge was giving a decision, he gave unsatisfactory reasons for that decision, it was competent for the other side, as soon as ever the opportunity was afforded them, to ask the judge to make a note of their objection, in order that they might then appeal. That would be taking a note at the trial, even though, in point of fact, judgment had been concluded.

Gt. E. R. v. *Giddons* (1880).

And, where the point of law had been raised as to whether there was evidence of negligence to go before the jury, the appellate Court (Kelly, C.B., and Hawkins, J.) held that it could not entertain the question, since it did not appear, from the judge's notes, that such question had, in fact, been raised. But Mr. Justice Hawkins thought that the notes should have been referred back to the judge for the question to be noted, and, in the event of his refusing, that a rule should have been obtained to compel him to amend his notes (*s*).

Morgan v. *Rees* (1881).

The case of *Morgan* v. *Rees* (*t*), which came before the Court of Appeal, establishes (1) that the request to take a note of a point of law and of the evidence in relation thereto must be made, not in general terms at the commencement of the trial, but when the point of law, the subject of appeal, actually arises. Both the statutes of 1875 and 1888 have

(*r*) Per Grove, J., in *Pierpoint* v. *Cartwright* (1880), 5 C. P. D. 139; 42 L. T. 259; 28 W. R. 583.

(*s*) *Gt. E. Rail. Co.* v. *Giddons* (1880), 44 J. P. 284.

(*t*) (1881), 6 Q. B. D. 508; 50 L. J. Q. B. 491; 44 L. T. 133; 29 W. R. 345.

apparently taken it for granted that the point of law can be stated at once at the trial, and then a note taken of the evidence; but (as the late Lord (then Lord Justice) Bramwell pointed out in the case cited) a point of law might arise in the course of the case, or the end of it. For instance, the defendant might say:—"I see, now the evidence is given, that there is a point of law in this matter." What the judge was to do then, the Lord Justice could not say. But that was the statute, and it seemed to mean that the judge must have notice of a point of law when one was taken, and a request to take the evidence in relation to it.

(2) That the appellate Court may (in the opinion of Bramwell, L. J.), in its discretion, allow an appeal without the signed notes of the County Court judge being produced, by virtue of the Order of January 22, 1877, which directed that no motion should be made by way of appeal from a County Court without the judge's notes being produced, "unless otherwise ordered." This Order is in effect replaced by Ord. LIX. r. 8, which gives the appellate Court a similar power.

Brown v. *Book* (1892).

In *Brown* v. *Book* (*u*), affidavits were laid before a Divisional Court, consisting of Mr. Justice Hawkins and Mr. Justice Wills, setting forth that at the termination of the hearing the appellant applied to the County Court judge for a copy of his note. The judge refused, saying that such application ought to have been made earlier. Subsequently the appellant learned at the Registrar's office that no note had been taken. It was held that, in the absence of a note, the appeal could not be heard, unless the County Court judge gave a certificate that no note had been taken. The appeal was therefore adjourned to enable the appellant to obtain either a note, or a certificate that none had been taken.

Cook v. *Gordon* (1892).

In the same year, and before a Divisional Court similarly constituted, was heard the case of *Cook* v. *Gordon* (*x*), the head-note to which is as follows:—

> An application to the judge of a County Court at the trial of any action for a note on any point of law and of the facts in evidence thereto, and of his decision thereon, is, under the terms of sect. 120 of the County Courts Act, 1888, the condition precedent for any appeal from such decision being heard. The power of the High Court under Ord. LIX. r. 8 of R. S. C., 1883, to admit any evidence or statement of what

(*u*) (1892), 8 T. L. R. 227.
(*x*) (1892), 61 L. J. Q. B. 445.

occurred, other than such notes of the judge, only comes into operation when such an application has been made at the trial, but no notes of the judge are forthcoming.

Mr. Justice Hawkins said the object of requiring a note to be taken by the judge on any question of law raised at the trial, and of facts relating to it, was to secure an authentic statement on which the Divisional Court could act.

Some application should have been made to the judge, and if he had made no notes of his own he could have been asked to certify to the correctness of any statement drawn up or agreed to by counsel on both sides as to what took place. This was a very convenient way of getting over the absence of any full notes, and most judges would be quite willing to certify to such statements. No application had been made here, and in the absence of any judge's notes or certificate of facts found at the trial, the preliminary objection must be upheld.

Mr. Justice Wills said the application to adjourn then, so as to ask the judge for a note, was made too late. The section of the Act clearly required an application to the judge at the trial. The Divisional Court could not dispense with statutory requirements. Ord. LIX. r. 8, allowing the Court to accept some statement, other than the judge's note, only applied when application for a note had been properly made to the judge at the time of the trial, but for some reason or another no note was forthcoming or available. In the case before the Court no application had been made at the trial, and the condition precedent for an appeal had therefore not been fulfilled. The appeal was disallowed.

Cook v. *Gordon* has not, however, been invariably followed. The proposition that an application to the judge for a note is a condition precedent to the right of appeal is clearly not supported by the appeal section of the Act or by cases previously decided (*y*), or by the general practice of the Courts, whilst the tendency of the Rules is against it. And in *James* v. *Evans* (*z*) a Divisional Court refused to follow Mr. Justice Wills' judgment as reported in *Cook* v. *Gordon*, holding that it is in the discretion of the Court to hear an appeal on any other statement where the judge has not been asked to take a note in the Court below. But as no explanation had been given of the omission to ask for a note to be taken, the Court refused to hear the appeal on the materials put forward by the appellant.

(*y*) See the judgments of Brett and Cotton, L. JJ., in *Seymour* v. *Coulson* (1880), C. A. 5 Q. B. D. 358; 49 L. J. Q. B. 604; 28 W. R. 664; pp. 27, 28, *infra*.
(*z*) (1895), Law Journal Newspaper, Feb. 9, p. 88.

R. v. *Kerr* (1894). The case of *Reg.* v. *His Honour Commissioner Kerr* (*a*) brought out the following points of practice:—A question of law must be raised at the hearing in the County Court, and when raised, the judge should be requested to make a note of it, which note will state the question of law, the evidence relating thereto, the judge's decision thereon (that is, on the question of law), and then as a separate matter he is to make a note of his decision of the action or matter. This distinctly shows that it is only with regard to a question of law that is raised that he can be asked to make a note at all. It is not sufficient merely to ask the judge to "take the usual note of the proceedings," and the Act does not authorise any request of the kind, and no party is at liberty to ask the judge to take a note of the proceedings. If there be more than one question of law, the request for the judge's note should be made with regard to each of them if it is intended to appeal. When, as may happen, it is impossible to comply with the statute and raise a point of law beforehand, and ask the judge to take a note of it, such as, for instance, when the point of law is that there is no evidence to warrant the final decision arrived at, then other notes of what occurred may be used if they have been taken, as, in the City of London Court, where a shorthand writer is employed by the Corporation to take notes in all cases, in the absence of the note which, under the circumstances, the parties have not been able to request the judge to take. When it has been impossible to obtain a judge's note of the point of law and evidence, the appellant, by leave of the Court, which, in Mr. Justice Cave's opinion, will, in such cases, never be refused, may show what his point of law was, and what the evidence was thereon, by any evidence that might be available for that purpose. He will not be bound to take a copy of shorthand notes of the case, as that is not the note contemplated by the Act, and in the absence of that note he may proceed upon his own affidavit. When it is clear that there has been no possibility of getting the regular note taken by the judge, then he has the choice either to obtain a copy of the shorthand notes, if any have been taken, or else to give an account upon affidavit of what happened at the trial, and how it came about that the point of law could not be raised in the ordinary way, and the judge requested to take a note, and so in one way or other he would be able to bring the facts to the knowledge of the appellate Court. With this Mr. Justice Wright concurred.

Barber v. *Burt* (1894). In an appeal from the same County Court, which came

(*a*) (1894), 70 L. T. 595: 10 T. L. R. 381.

before Mr. Justice Cave and Mr. Justice Collins (*b*), the practice was similarly recognized, that where it is impossible to request the County Court judge to make a note at the time when the point appealed against arose—*e.g.*, on account of its having arisen at the close of the summing-up—the appellant is entitled to obtain and use a transcript of short-hand notes of the case, and costs of so much of such notes as are necessary for the appeal will be allowed. In general, however, in cases tried with a jury, only the costs of the note of the summing-up ought to be allowed.

Seymour v. *Coulson* (1880).

The question as to whether a request for a note to be taken is or is not a condition precedent to the existence of a right of appeal, would appear to have been sufficiently disposed of in *Seymour* v. *Coulson* (*c*), in 1880, when a Divisional Court, consisting of Cockburn, C. J., and Mellor, J., discharged a rule to set aside judgment on the ground that the County Court judge had not been so requested as required by the Act (of 1875). The judge had, in fact, taken an adequate note, and furnished it, though under protest. On the case coming before the Court of Appeal, Lord Justice Brett, said :—"The Queen's Bench Division were of opinion that upon the true construction of the statute the request to the judge is a condition precedent to the right of appeal. I do not think that the request is a condition precedent; the language is not consistent with that construction. Section 6 gives a new form of procedure upon appeal, instead of that which had previously existed and had been found inconvenient. [The Lord Justice read sect. 6 (*d*).] It gives no new right of appeal as to the subject-matter, and no right of appeal as to facts. It only enacts that the procedure need not be by special case; the section is not in the form of a proviso or of a condition precedent. The enactment is in favour of the party who appeals and for his benefit, and in order that he may appeal under favourable circumstances. In some cases the judge may think that the point is not of sufficient importance to warrant an appeal, and may not take a note, and the statute has provided that the judge shall take a note on application; therefore, the request is not a condition precedent.

"We are not called upon to decide what may be the effect in a case where no note has been taken and no request has been made to the judge to take it, or where the judge has

(*b*) *Barber* v. *Burt*, (1894) 2 Q. B. D. 437; 10 R. 397; 63 L. J. Q. B. 700; 71 L. T. 295; 42 W. R. 572.
(*c*) (1880), 5 Q. B. D. 358; 49 L. J. Q. B. 604; 28 W. R. 664.
(*d*) Set out on p. 20, *supra*.

Seymour v. *Coulson* (1880) —contd.

been requested to take a note and has failed to do so; because in the present case the judge has sent a full note with a statement of the points of law which were decided by him at the trial, at least in his own mind.

"When the judge has not been requested to take a note, we do not decide whether an appeal lies if he has decided more than one point of law and the evidence raises several. If the judge does decide all the points of law and states the evidence, it is sufficient to enable the party dissatisfied with the decision to appeal."

Lord Justice Cotton said:—"By the County Courts Act, 1875, s. 6, a new right of appeal was not given; the statute assumes that the right of appeal already existed; it merely creates a particular mode of appeal as to questions of law." And, in the Lord Justice's opinion, the section did not make the request to the judge to take a note a condition precedent to the right of appeal. It merely rendered it obligatory upon the judge to take a note at the request of either party.

"The right of appeal is not restricted; it is enough if the point of law appears to have been raised at the trial before the judge of the County Court; and it is sufficiently raised if the judge necessarily decided it in order to arrive at a conclusion.

"The view of this Court does not extend to those cases where the question of law does not appear upon the judge's note. I give no opinion as to such a case as that; it may be necessary, then, to proceed by special case.

"Further, I say nothing as to an appeal where it is shown that, by the omission to request that a note be taken, evidence material to the point of law raised upon the rule has not been given. In the present case it appears that all the material facts have been stated by the judge."

Lord Justice Thesiger, agreeing, said that the right of appeal was given by the County Courts Act, 1850, under which statute it was necessary to proceed by special case, and occasionally a difficulty was interposed in the way of the appeal from the circumstance that an imperfect note had been taken by the judge during the trial. In order to remedy this inconvenience, a new kind of procedure was introduced by the County Courts Act, 1875, s. 6, under which a person who is aggrieved is empowered to appeal by motion. *Primâ facie*, he would be entitled to move as in ordinary cases in the High Court, upon counsel's brief and notes, and the ordinary materials used upon such motions; but the legislature probably thought it advisable to provide for those cases in which there might be contradictions as to

the questions raised or the evidence given before the County Court judge; and in order that the Court might have an accurate note of the questions and evidence, provided that the party intending to dispute his decision might request the judge to take a note of the evidence and of his determination thereon. It seemed to the Lord Justice that all these provisions were intended for the benefit of the party intending to appeal by motion, and did not constitute a condition precedent to his right to appeal. *Seymour* v. *Coulson* (1880) —contd.

It was unnecessary to decide how matters would have stood if no note had been taken; but a note did exist upon which the facts were fully stated, and the Court could ascertain from it what evidence had been given and what questions had been raised at the trial. It would defeat the purposes of the statute if the Court were to refuse to hear the appeal merely because during the trial no request had been made to the judge to take a note. And the appeal was heard accordingly.

In an appeal to a Divisional Court composed of Lord Coleridge, C.J., and Mr. Justice Hawkins, where no judge's note was before the Court, the late Lord Chief Justice said there were no materials before the Court upon which to decide the appeal. In that case, two affidavits were filed by the appellant which purported to state what occurred at the County Court. The Lord Chief Justice said, the County Court judge might have been asked to take a note, and might have taken it, and such note might be then in existence. That being so, the Court could not have recourse to the other modes which the rules provide in cases where it is satisfied that no note has been taken (*e*). *Lumb* v. *Teal* (1889).

Mr. Justice Hawkins, in agreeing, said the Court was not bound to admit anything but the judge's notes. It was true that, by Ord. LIX., r. 8, it had power, if the judge's notes were not produced, to determine appeals upon any other evidence or statement of what occurred before him as it should deem sufficient; but it ought to have some reason or explanation given to account for the non-production of the notes—such as that none had been taken, or that they had been lost. The affidavits before the Court gave no such reason or explanation: not stating that no notes were taken, or that no application had been made for them.

(*e*) *Lumb* v. *Teal* (1889), 22 Q. B. D. 675; 58 L. J. Q. B. 298; 60 L. T. 451.

CHAPTER VI.

SUBJECTS OF APPEAL.

A.—In Contract or Tort; debt or damage over 20*l.*

Appeals given by statute.

An appeal lies in all actions of contract or tort where the debt or damage exceeds 20*l.* (*a*).

Amount over 20*l.*

Wherever the plaintiff's claim is over 20*l.* the right of appeal arises, and the plaintiff cannot deprive the defendant of that right by abandoning the excess, and taking a verdict for something under 20*l.* (*b*); nor does it matter that the actual verdict and judgment be for an amount under 20*l.* (*c*).

I.e., claimed, not adjudged.

So, where, under the Act of 1850 (*d*), a plaintiff claimed 22*l.*, but judgment was given for only 12*l.*, it was held that plaintiff's right of appeal was not lost, since it depended on the amount for which the action had been commenced, and not upon the amount adjudged. "The cause," it was held, "was an appealable cause when it was brought in the County Court, and nothing had occurred to take away that right" (*e*).

But where a suit was substantially one for under 20*l.*, though brought, in fact, to recover 20*l.* 1*s.*, it was held that there was no appeal (*f*).

B.—In Ejectment or Title; value immaterial.

Ejectment: title.

An appeal lies in all actions of ejectment, or in which the title to any corporeal or incorporeal hereditaments shall have come in question, without regard to their value (*g*).

(*a*) 51 & 52 Vict. c. 43, s. 120; *Rackham* v. *Blowers* (1851), 20 L. J. Q. B. 397; 15 Jur. 758.

(*b*) *North* v. *Holroyd*, (1868), L. R. 3 Ex. 69; 37 L. J. Ex. 42; 17 L. T. 57.

(*c*) *Harris* v. *Dreesman* (1854), 9 Ex. 485; 23 L. J. Ex. 210; 2 C. L. R. 498, decided under 13 & 14 Vict. c. 61, s. 14.

(*d*) 13 & 14 Vict. c. 61, s. 14.

(*e*) *Harris* v. *Dreesman* (1854), 9 Ex. 485; 23 L. J. Ex. 210; 2 C. L. R. 498.

(*f*) *Mayer* v. *Burgess* (1855), 4 E. & B. 655; 24 L. J. Q. B. 67; 1 Jur. N. S. 473.

(*g*) 51 & 52 Vict. c. 43, s. 120.

C.—**In Replevin; rent or damage, or goods seized, over 20*l.***

An appeal lies in all actions of replevin where the amount of rent or the goods seized exceeds 20*l.* (*h*). Replevin.

D.—**In Recovery of Tenements; yearly value over 20*l.***

An appeal lies in any action for the recovery of tenements, the yearly rent or value of which exceeds 20*l.* (*i*). But if the yearly rent or value does not exceed 20*l.*, there is no appeal without leave, whether the parties be landlord and tenant or otherwise, or (in the opinion of Denman, J.) whether the title to the premises be in question or not (*k*). Recovery of tenements.

E.—**In Interpleader; Money, Goods, or Proceeds over 20*l.***

An appeal lies from proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed, or the proceeds thereof, exceeds 20*l.* (*l*); but not where the value does not exceed that amount, even by leave (*m*). Interpleader.

Similarly, where the value of the goods seized exceeds 20*l.*, although the claim in the original plaint be below 20*l.*, it was held that an appeal would lie (*n*). And the right of appeal may be claimed by a landlord who has appeared at the hearing of the interpleader summons, as well as by the claimant and the execution creditor (*o*).

But the right was denied to a claimant who had deposited less than 20*l.*, that being the value of the goods claimed, as fixed by appraisement, and who desired to appeal on the ground that the real value of the goods was over 20*l.*, and that the smaller sum had been deposited because it was sufficient to pay the judgment creditor's judgment (*p*).

And, similarly, under the Act of 1888, where the value of the goods claimed was less than 20*l.*, and the claimant claimed damages exceeding 20*l.*, judgment being given for 15*l.* against the execution creditor without leave to appeal, it was held, by a Divisional Court consisting of Lord Coleridge, L.C.J.,

(*h*) 51 & 52 Vict. c. 43, s. 120.
(*i*) *Ibid.*
(*k*) *Shrewsbury* (*Earl of*) v. *Garfield* (1891), 60 L. J. Q. B. 765.
(*l*)——51 & 52 Vict. c. 43, s. 120. *Foulger* v. *Taylor* (1860), 5 H. & N. 202; 29 L. J. Ex. 142.
Oliver v. *Lewis* (1889), W. N. 224.
(*m*) *Collis* v. *Lewis* (1887), 20 Q. B. D. 202; 57 L. J. Q. B. 167; 57 L. T. 716; 36 W. R. 472.
(*n*) *Vallance* v. *Nash* (1858), 2 H. & N. 712; 27 L. J. Ex. 142; 4 Jur. N. S. 31.
(*o*) *Wilcoxon* v. *Scarby* (1860), 29 L. J. Ex. 154.
(*p*) *White* v. *Milne* (1887), 58 L. T. 22.

and Mr. Justice Hawkins, that the execution creditor had no right of appeal under sect. 120 (*q*).

Prior to the statute of 1856 (*r*), no appeal lay upon an interpleader matter, the appeal section of 13 & 14 Vict. c. 61, as Parke, B., said, only giving the right to "parties in a cause," the claimant in an interpleader summons not being such a party, just as a claimant in the superior Courts could not bring a writ of error or tender a bill of exceptions. Alderson, B., agreed, adding that the decision in an interpleader summons was not in the nature of a judgment, being a mere discretionary order regulating the execution of the previous judgment in the plaint (*s*). So, again, in other cases decided before the Act of 1856 (*t*).

F.—On the admission or rejection of any Evidence.

Evidence.

An appeal lies upon the admission or rejection of any evidence, and the appellate Court may either order a new trial, or order judgment to be entered for any party (*u*).

Under the 13 & 14 Vict. c. 61, s. 14, opinions differed as to whether the Court could do more than direct a new trial (*x*).

G.—In Equity; value immaterial (*y*).

In Equity.

To give ground for an appeal in equity cases there must be a misapplication by the judge of the principles of equity to the facts which he finds (*z*).

H.—In every case by leave; value immaterial (*a*).

By leave.

An appeal lies in every action or matter in which the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal (*a*).

(*q*) *Lumb* v. *Teal* (1889), 22 Q. B. D. 675; 58 L. J. Q. B. 298; 60 L. T. 451.
(*r*) 19 & 20 Vict. c. 108, s. 68.
(*s*) *Beswick* v. *Boffy* (1854), 9 Ex. 315; 23 L. J. Ex. 89; 2 C. L. R. 558.
(*t*) *E.g.*, *Fraser* v. *Fothergill* (1854), 14 C. B. 295; 23 L. J. C. P. 53; 9 Ex. 315; 2 C. L. R. 503.
(*u*) 51 & 52 Vict. c. 43, ss. 120, 122.
(*x*)——*Jonas* v. *Adams* (1851), 20 L. J. Q. B. 397. But see *Whiteman* v. *Hawkins* (1878), 4 C. P. D. 13; 39 L. T. 629; 27 W. R. 262.
(*y*) 51 & 52 Vict. c. 43, s. 120.
(*z*) *Hill* v. *Perssée* (1877), 25 W. R. 275.
(*a*) 51 & 52 Vict. c. 43, s. 120.

I.—In any action or matter (if any) not by the appeal section specifically excepted, limited, or curtailed: value immaterial (*b*).

In matters not excepted.

The right of appeal in the matters classified in the foregoing paragraphs is conferred by the appeal section of the statute.

An appeal has also been held to lie in the matters now to be enumerated:—

Appeals given by judicial decisions.

For further and better Answers to Interrogatories.—An appeal lies from the ruling of a County Court judge against an application for further and better answers to interrogatories (*c*).

Answers to interrogatories.

Refusal to receive Verdict and enter Judgment.—Where the County Court judge refused to receive the verdict of the jury and enter judgment accordingly, but discharged the jury, a rule *nisi* was granted calling on him to show cause why it should not be so received and entered, and judgment given accordingly (*d*).

Refusal to enter judgment.

Refusal of County Court Judge to grant New Trial.—Under the appeal section of the Act of 1888, there is a right of appeal from the refusal of a County Court judge to allow a new trial (*e*), the altered words of the section, "judgment, direction, decision, or order," giving it a wider scope (*f*) than that bestowed by the 13 & 14 Vict. c. 61, s. 14, under which it had been repeatedly held that no appeal lay in interlocutory proceedings at all (*g*). In 1865, however, by sect. 18 of 28 & 29 Vict. c. 99, an appeal was given in such matters, though only on the equity side (*h*), and the Act of

New trial.

(*b*) See 51 & 52 Vict. c. 43, s. 120.
(*c*) *Meek* v. *Witherington* (1892), 67 L. T. 122; 57 J. P. 7.
(*d*) *Jardine* v. *Smith* (1860), 8 W. R. 464.
(*e*)——*Pole* v. *Bright* (per Mathew and Smith, JJ.), (1892) 1 Q. B. 603; 65 L. T. 748; 40 W. R. 95; 61 L. J. Q. B. 139, following
Dingor v. *Matthews* (1889), 65 L. T. 748, and dissenting from
How v. *L. & N. W. Rail. Co.*, (1891) 2 Q. B. 496; 40 W. R. 44.
(*f*) *Dingor* v. *Matthews* (1889), *ubi sup.*
(*g*)——*McHardy* v. *Liptrott* (1887), 19 Q. B. D. 151; 56 L. J. Q. B. 459.
Morris v. *Lowe* (1885), 34 W. R. 45.
Jacobs v. *Dawkes* (1887), 56 L. T. 919; 56 L. J. Q. B. 446; 35 W. R. 649.
Wilton v. *Leeds Forge Valley Co.* (1884), 32 W. R. 461.
Carr v. *Stringer* (1858), E. B. & E. 123.
The Cashmere (1890), 15 P. D. 121; 59 L. J. P. 57; 62 L. T. 814; 38 W. R. 623.
(*h*) See *Jonas* v. *Long* (1888), per Fry and Lopes, L.JJ., 20 Q. B. D. 564; 57 L. J. Q. B. 298; 58 L. T. 787; 36 W. R. 315; 52 J. P. 468.

1888 contains practically, if not identically, the words contained in the former statute.

The power to grant new trials now conferred upon the judges of County Courts by sect. 93 of the Act of 1888 is not, however, an absolute power, to be exercised upon any grounds which the judge may think fit, but subject to the same limitations as to the grounds on which a new trial may be granted as are imposed upon the judges of the Supreme Court (*i*).

The County Court judge should not give judgment for a party, *pro forma*, giving leave to the other party to apply for a new trial before a jury (unless by consent): he should hear the case and determine it (*k*).

And where the parties consented to a juror being withdrawn, and the matter being determined by the judge, but before judgment was pronounced one of them withdrew his consent, the Court of Common Pleas held (Brett, J., dissenting) that the withdrawal of a juror had not put an end to the action; and a rule was made absolute for a rehearing (*l*).

So, again, where the County Court judge wrongly ruled as to who was entitled to begin at the trial, a new trial was ordered (*m*).

New trials in Mayor's Court.

The Judge of the Mayor's Court may at any time hear and grant applications—

(1) for rules to show cause for arrest of judgment;
(2) or for judgment *non obstante veredicto;*
(3) or for granting new trials;
(4) and for entering verdicts or non-suits in causes pending in the Court (*n*).

The practice under this section is either by *ex parte* motion for a rule *nisi*, or by motion for a rule absolute, after notice, which notice must state the grounds upon which the application is based. In every rule *nisi* for a new trial, or to enter a verdict or nonsuit, the grounds upon which such rule shall have been granted must also be shortly stated (*o*).

No new trial will be granted by reason of the ruling of the judge that the stamp upon any document is sufficient, or that

(*i*) *Murtagh* v. *Barry* (1890), 24 Q. B. D. 632; 59 L. J. Q. B. 388; 38 W. R. 526.
(*k*) *Marshall* v. *Bluman* (1893), W. N. 184; 10 T. L. R. 85.
(*l*) *Norburn* v. *Hilliam* (1870), L. R. 5 C. P. 129; 39 L. J. C. P. 129; 22 L. T. 67; 18 W. R. 602.
(*m*)——*Ashby* v. *Bates* (1846), 15 M. & W. 589.
Booth v. *Mills* (1846), 15 M. & W. 669; 15 L. J. Ex. 354; 4 D. & L. 52.
(*n*) Mayor's Court Procedure Act, 1857, s. 22.
(*o*) Common Law Procedure Act, 1854, s. 33.

the document does not require a stamp (*p*); and when a new trial is granted on the ground that the verdict was against the weight of evidence, the costs of the first trial will abide the event, unless the Court otherwise orders (*q*).

Where a rule to enter a verdict or nonsuit upon a point reserved at the trial is discharged or made absolute, the party decided against may appeal (*r*), and the Court of Appeal will give such judgment as ought to have been given in the Court below; and all such further proceedings may be taken thereupon as if the judgment had been given by the Court in which the record originated (*s*). But sect. 35 of the Common Law Procedure Act, 1854, which gives a right of appeal against an order for, or a refusal to grant, a new trial, has not been applied to the Mayor's Court.

No jurisdiction.

Where the Judge tried a Case which he ought not to have tried.—Where a County Court judge had tried a case which he should not have tried, and the rule relating to it (*i.e.*, as to time) being obligatory and not merely directory, a Divisional Court (Grove and Lopes, JJ.) held that the defendant's proper remedy was to appeal, and not to apply for a prohibition against the issue of execution on the judgment, it not necessarily following that an appeal does not lie because there is a remedy by prohibition (*t*).

Interlocutory matters.

Interlocutory Matters Generally.—The County Courts Act of 1888 gives a right of appeal in all interlocutory matters, and the principle of the cases which have decided that an appeal lies from the order of a County Court judge granting, or refusing to grant, a new trial is equally applicable, *e.g.*, to the case of an appeal on a question of taxation (*u*).

Prior to the current Act, however, no appeal would lie on an interlocutory matter (*x*).

(*p*) Common Law Procedure Act, 1854, s. 31.
(*q*) *Ibid.* s. 44.
(*r*) *Ibid.* s. 34.
(*s*) *Ibid.* s. 41.
(*t*) *Barker* v. *Palmer* (1881), 8 Q. B. D. 9; 51 L. J. Q. B. 110; 45 L. T. 480; 30 W. R. 59. And see Comyn's Digest, tit. Proh. Bk. 7, D. p. 140.
(*u*) *Gilson* v. *Kilner* (1893), 69 L. T. 310.
(*x*)——*Carr* v. *Stringer* (1858), E. B. & E. 123.
Jonas v. *Long* (1888), 20 Q. B. D. 564; 57 L. J. Q. B. 298; 58 L. T. 787; 36 W. R. 315; 52 J. P. 468.

CHAPTER VII.

APPEALS SPECIFICALLY CONFERRED BY SPECIAL ENACTMENTS.

Special appeals.

Construction of specific enactments.

APPEALS are in some cases conferred by special enactments, which also regulate the procedure to be observed. Where such procedure conflicts with, or is in any way different from the general procedure in appeals from County Courts as regulated by the general enactments and rules, the usual rule of interpretation is that the general enactment does not repeal a specific one to which it does not refer, even though the former be of later date (*a*). And Sir John Romilly, M.R., agreed, in *Minet* v. *Leman* (*b*), that upon the construction of all statutes the general words of an Act are not to be construed so as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched. The same rule was applied by Wood, V.-C., in *Farley* v. *Bonham* (*c*), and is indeed obviously just and convenient.

Rivers Pollution Act.

Rivers Pollution Act, 1876.—The Rivers Pollution Act, 1876 (*d*), gives the County Court jurisdiction by sect. 3, and by sect. 11 provides for appeal by special case, on the merits. The County Courts Act, 1888, while giving an appeal on questions of law, is silent as to a special kind of appeal given, as by this statute, on the merits. The specific appeal, on the merits, given by the special statute, therefore, stands, though Bowen, L.J., considered that sect. 124 of the County Courts Act, 1888, nevertheless draws special appeals like this within the provisions of its 121st section, so as to subject them to the procedure followed in ordinary County Court appeals (*e*).

Agricultural Holdings Act.

Agricultural Holdings Act, 1883 (*f*).—An appeal was held to lie from a County Court judge in the matter of a dispute

(*a*) *In re West Devon Great Consolidated Mine* (1888), C. A., 38 Ch. D. 51.
(*b*) (1855), 20 Beav. 269; 24 L. J. Ch. 544.
(*c*) (1860), 30 L. J. Ch. 239.
(*d*) 39 & 40 Vict. c. 75.
(*e*) *Kirkheaton District Board* v. *Ainley*, (1892) 2 Q. B. 274; 61 L. J. Q. B. 812; 67 L. T. 209; 41 W. R. 99.
(*f*) 46 & 47 Vict. c. 61, s. 46.

heard and determined by him under sect. 46 of the Agricultural Holdings Act, 1883, under the general powers of appeal contained in sect. 13 of the County Courts Act, 1867 (*g*).

Friendly societies.

Friendly Societies.—In the case of an unregistered society, under sect. 30, sub-sect. 10, of the Act of 1875 (*h*), the right of appeal to, and therefore from, a County Court or Court of Summary Jurisdiction overrides any rules of the society to the contrary (*i*).

In *R.* v. *Kettle* (*k*), it was held in effect that in ordinary cases where an appeal is given to the High Court, that appeal must, under the rules, be made by notice of motion. The rules as to County Court appeals forbid a resort to the appeal by special case, which, by 13 & 14 Vict. c. 61, was given in ordinary actions. But that case does not necessarily apply to cases in which the right of appeal by special case is given by statute under special circumstances (*l*).

Building societies.

Building Societies.—It is provided by the Building Societies Act of 1874 (*m*), that the rules of every society established under the Act shall set forth whether disputes between the society and any of its members shall be referred to a County Court or to the registrar, or to arbitration; and it was held by the House of Lords (Lord Selborne, C., *dissentiente*) that the High Court had no jurisdiction (*n*), thus affirming the principle already stated, that where a special Act expressly gives a jurisdiction the Courts will not readily refuse to recognise it. The case of *Hack* v. *London Provident Building Society* (*o*) was approved, in which Pearson, J., had held, under the same Act, that the jurisdiction of the Court was ousted, and that the society was entitled to have the dispute referred to arbitration (*p*).

Companies Act, 1867.

Companies Act, 1867.—A right of appeal from the County Court to the Vice-Chancellor was given by the Companies Act, 1867, which was not confined to mere questions of law, but referred to matters of discretion also. By the Judica-

(*g*) 30 & 31 Vict. c. 142; *Hanmer* v. *King* (1887), 57 L. T. 367; 51 J. P. 804.
(*h*) 38 & 39 Vict. c. 60 (explained by 42 Vict. c. 9).
(*i*) *Knowles* v. *Booth* (1884), 32 W. R. 432.
(*k*) (1886), 17 Q. B. D. 761; 55 L. J. Q. B. 470; 54 L. T. 875; 34 W. R. 776.
(*l*) *Wilkinson* v. *Jagger* (1888), 20 Q. B. D. 423; 57 L. J. Q. B. 254; 58 L. T. 487; 36 W. R. 169; 52 J. P. 533.
(*m*) 37 & 38 Vict. c. 42, s. 16, sub-s. 9.
(*n*) *Municipal Permanent Building Society* v. *Kent* (1884), 9 App. Cas. 260; 51 L. T. 6; 53 L. J. Q. B. 590; 32 W. R. 681.
(*o*) C. A. (1883), 23 Ch. D. 103; 48 L. T. 247.
(*p*) See also *Wright* v. *Monarch Investment Society* (1877), 5 Ch. D. 726.

ture Act, 1873 (*q*), this was transferred to the Divisional Court (*r*).

Industrial Societies Act.

Industrial and Provident Societies Act.—It was held that no appeal lay to the Court of Common Pleas from the County Court in respect of an order made in exercise of its powers in a winding-up proceeding under sect. 17 of the Industrial and Provident Societies Act, 1862 (*s*).

Tithe Act.

Tithe Act, 1891 (*t*).—A Divisional Court (Lawrance and Wright, JJ.) held (*u*) that the provisions of the County Courts Act, 1888, as to appeals were not applicable to cases under the Tithe Act, and overruled a preliminary objection that no point of law had been raised at the trial. Sect. 7 of the Tithe Act, 1891, provides for an appeal to the High Court, subject to such conditions as may be, for the time being, provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior Courts to the High Court.

(*q*) 36 & 37 Vict. c. 66, s. 45.
(*r*) *Andrew* v. *The Swansea Cambrian Building Society* (1881), 44 L. T. 106; 50 L. J. Q. B. 428; 29 W. R. 382; 45 J. P. 507.
(*s*) 25 & 26 Vict. c. 87; *Henderson* v. *Bamber* (1865), 19 C. B. N. S. 540; 35 L. T. 65.
(*t*) 54 Vict. c. 8.
(*u*) *Ecclesiastical Commissioners* v. *Stallon* (1895), 98 L. T. Jo., p. 371.

CHAPTER VIII.

CASES IN WHICH THERE IS NO APPEAL.

Those prohibited by Statute (*a*);

No appeal by statute.

Those held by the Courts to be non-appealable; (e. g.)—From an Order of Committal.—In the early case of *Rackham* v. *Blowers* (*b*), it was held that the appeal given by the Act of 1850 applied only to the judgments of County Courts, and not to orders of committal under sect. 99 of 9 & 10 Vict. c. 95. In *Reg.* v. *Jordan* (*c*), it was laid down that the Superior Court will decline to exercise any appellate jurisdiction over a County Court in matters of fine or committal for contempt, except where there is no reasonable evidence of any contempt having been committed, and the liberty of the subject requires protection, following *Ex parte Pater* (*d*). And the same principle was followed by the Court of Appeal in the more recent case of *Lewis* v. *Owen* (*e*), where the County Court judge had imposed a fine, under sect. 48 of the Act of 1888, for an assault on an officer of the Court, while in the execution of his duty. For by the interpreting section of that Act, "matter" is to mean every proceeding in the Court which may be commenced as prescribed otherwise than by plaint, and "prescribed" means prescribed by the County Court Rules for the time being. It would seem, however, that a proceeding in respect of which there is a form of summons given in the forms appended to the County Court Rules, is a matter

Cases in which there has been held to be no appeal.

(*a*) For the terms of the statute and the limitations therein imposed upon the general right of appeal, see p. 9, *ante*.

(*b*) (1851), 15 Jur. 758; 20 L. J. Q. B. 397, decided under 13 & 14 Vict. c. 61, s. 14.

(*c*) (1888), 36 W. R. 589: affirmed on appeal, 57 L. J. Q. B. 483; 36 W. R. 796.

(*d*) (1864), 33 L. J. M. C. 142; 12 W. R. 823; 5 B. & S. 299; 9 C. C. C. 544; 10 Jur. N. S. 972; 10 L. T. 376.

(*e*) (1894) 1 Q. B. 102; 10 R. 59; 63 L. J. Q. B. 233; 69 L. T. 861; 42 W. R. 254; 58 J. P. 263; 10 T. L. R. 39.

within the meaning of sect. 186, though there be no County Court Rule prescribing how it shall be commenced (*f*).

But a Divisional Court (Field and Cave, JJ.) held that there is a right of appeal from the refusal of a County Court judge to commit a defendant for disobedience (*g*), although the Court, after considering the merits, upheld the County Court judge's decision.

Another Divisional Court (Mathew and A. L. Smith, JJ.), whilst agreeing with the rule that if there was any evidence before a County Court judge upon which he had jurisdiction to make an order of committal, the Court had no right to interfere with its exercise by him, held that it could interfere if he had no jurisdiction whatever, and had exercised an authority which he had not. And the motion, though in form an appeal, was treated by the Court as a motion for prohibition (*h*).

Judgment *pro formâ*.

Judgment entered pro formâ *for Appeal.*—A Divisional Court has no jurisdiction to hear a motion to set aside a judgment entered by a County Court judge *pro formâ* in order to expedite an appeal, such entry not being a determination or direction within the meaning of sect. 14 of 13 & 14 Vict. c. 61, under which statute the case cited was decided (*i*); Pollock, B., observing that the old practice of entering judgment for one of the parties to an action, giving the other party leave to move, was abolished, and that it was desirable that all cases should be argued in the County Court, and that the County Court judge should form a judgment on them, of which the Divisional Court should have the benefit.

Garnishee order.

Garnishee Order.—It was held, in *Mason* v. *The Wirral Highway Board* (*k*), that there could be no appeal under the former statute and County Court Rules, 1875, from a garnishee order, it not being a decision in "an action" or "cause" within the meaning of the County Courts Acts (*l*).

Award.

Refusal to set aside an Award.—A suit in a County Court having been referred by the judge to an arbitrator, under 9 & 10 Vict. c. 95, s. 77, and the award having been entered up as the judgment, an application was made under the former statute to set it aside on the ground that the arbitrators had exceeded their jurisdiction. The application having

(*f*) *Lewis* v. *Owen, ubi sup.*
(*g*) *Vallentin* v. *Woodley* (1889), 5 T. L. R. 462.
(*h*) *Draycott* v. *Harrison* (1886), 17 Q. B. D. 147; 34 W. R. 546.
(*i*) *Chapman* v. *Withers* (1887), 58 L. T. 24; W. N. 235.
(*k*) (1879), 4 Q. B. D. 459; 48 L. J. Q. B. 679; 27 W. R. 676.
(*l*) But see the wider terms of the appeal section of the Act of 1888 (51 & 52 Vict. c. 43, s. 120).

been refused, the appellate Court held that it had no jurisdiction, under 13 & 14 Vict. c. 61, s. 14, to entertain an application on appeal to set aside the award (*m*).

Non-suit.

From refusal to hear Witnesses and Non-suit.—To enable the High Court to interfere, the County Court judge must have refused to exercise the jurisdiction vested in him; but where, on his refusal to hear witnesses, the plaintiff had elected to be non-suited, it was held that the High Court had no power to compel him to hear them, as the non-suit, while it stood, left the judge no case upon which he could act (*n*).

After consent.

After consent not to Appeal.—The parties may by writing, by themselves or by their agents, agree not to appeal from the judgment of the County Court judge (*o*). Counsel have authority to consent not to appeal. And every compromise involves an undertaking not to appeal (*p*).

But to constitute a consent order, there must be a bargain between the parties, not a mere acceptance by the appellant of an order offered by the Court (*q*). And where the question tried was merely one of costs, the rest of the order being taken by consent, it was held that this was in effect a consent order, and no appeal lay (*r*).

(*m*) *Mayer* v. *Farmer* (1878), 3 Ex. D. 235; 47 L. J. Ex. 760; 26 W. R. 760. But see now the Act of 1888 (51 & 52 Vict. c. 43, s. 120).
(*n*) *Fortescue* v. *Paton* (1860), 3 L. T. 268.
(*o*) 51 & 52 Vict. c. 43, s. 64.
(*p*) Per Cotton, L. J., in *In re West Devon Great Consolidated Mine* (1888), 38 Ch. D. 51; 57 L. J. Ch. 850; 58 L. T. 61; 36 W. R. 342.
(*q*) *Aldam* v. *Brown* (1890), W. N. 116.
(*r*) *Hadida* v. *Fordham* (1893), 10 T. L. R. 139.

CHAPTER IX.

PROCEDURE ON APPEAL.

Procedure on appeal.

APPEALS from County Courts are now heard by Divisional Courts (*a*).

Ord. LIX. provides that:—

Ord. LIX. r. 7.

R. 7. "On any motion by way of appeal from an inferior Court, the Court to which such an appeal may be brought shall have power to draw all inferences of fact which might have been drawn in the Court below, and to give any judgment and make any order which ought to have been made. No such motion shall succeed on the ground merely of misdirection, or improper reception or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned in the Court below."

Rule 8.

R. 8. "On any motion by way of appeal from an inferior Court, the Court to which any such appeal may be brought shall have power, if the notes of the judge of such inferior Court are not produced, to hear and determine such appeal upon any other evidence or statement of what occurred before such judge which the Court may deem sufficient."

Rule 10.

R. 10. "Every appeal shall be by notice of motion, and no rule *nisi* or order to show cause shall be necessary.

"The notice of motion shall state the grounds of appeal, and whether all or part only of the judgment, order, or finding, is complained of.

"The notice of motion shall be an eight days' notice, and shall be served on every party directly affected by the appeal entered."

Rule 11.

R. 11. "Every appeal shall be entered at the Crown Office Department of the Central Office, and the entry shall be made by lodging a copy of the notice."

(*a*) Jud. Act, 1873, s. 45; County Courts Act, 1888, s. 120; R. S. C., Ord LIX. rr. 1 (c), 10—17.

R. 12. "The notice of motion shall be served, and the appeal entered, within twenty-one days from the date of the judgment, order, or finding complained of; such period shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or from the time at which the finding or any refusal is made or given." Rule 12.

R. 13. "It shall be the duty of the Master of the Crown Office Department, forthwith upon the entry of the appeal, to apply, on behalf of the High Court, to the judge of the inferior Court from which the appeal is brought, for a copy of the notes of the evidence given, and for a statement of his judgment or finding on any question of law under appeal" (*b*). Rule 13.

"Either party shall be entitled, on payment of the proper fee, to obtain from the Crown Office Department an office copy of such notes and statement."

R. 14. "The appeal shall not operate as a stay of proceedings under the decision appealed from, unless the inferior Court shall so order, or unless within ten days after the decision, a deposit shall be made of a security given to the satisfaction of such inferior Court, for a sum to be fixed by the said Court, not exceeding the amount of the money or the value of the property affected by the judgment, order, or finding appealed from." Rule 14.

R. 15. "Every appeal from an inferior Court shall be entered in the proper list for hearing on such days as the Lord Chief Justice of England may direct, and shall come on to be heard in its order, unless the High Court shall otherwise direct." Rule 15.

R. 16. "The High Court shall have power to extend the time for appealing, or to amend the grounds of appeal, or to make any other order, on such terms as the Court shall think just, to ensure the determination on the merits of the real questions in controversy between the parties." Rule 16.

R. 17. "Subject to these rules, the rules for the time being in force with respect to appeals from the High Court to the Court of Appeal shall, so far as practicable, apply to and govern appeals from County Courts and other inferior Courts of record of civil jurisdiction to the High Court." Rule 17.

R. 18. "Appeals from inferior Courts shall, in the construction of Ord. LIX., include every appeal, motion, or application to set aside or vary any verdict or judgment in or of any County Court, or for a new trial in actions in the High Court remitted to such County Court for trial or otherwise." Rule 18.

(*b*) This rule has been repealed by sect. 121 of the County Courts Act, 1888. (See note (*o*), p. 45, *infra*.)

Appeal by motion;

It was decided, under the Act of 1875 (*c*), that the mode of appealing by motion, instead of by the former procedure by special case, applied to all actions where leave to appeal could be given, as well as to those where such leave was unnecessary, there being no distinction between the two cases (*d*).

by notice;

In *Matthews* v. *Ovey* (*e*), it was held that the appeal should be by motion *ex parte* in the first instance, and not by giving notice of motion under Ord. XXXIX. r. 3 (*f*). In *Harris* v. *Galpin* (*g*), decided in 1883, it was held that the effect of Ord. LII. of 1883 was to repeal so much of sect. 6 of the County Courts Act, 1875, as required appeals from County Courts to be made *ex parte* in the first instance, and that notice of motion should be given under that Order before moving the Queen's Bench Division. And Ord. LIX. r. 10 (of 1885) clearly settled this as the practice by enacting in terms that no rule *nisi*, or order to show cause, shall be necessary.

and not *ex parte*.

Grounds of appeal to be stated.

The same rule directs that the notice of motion is to state the grounds of appeal; but inasmuch as Ord. LIX. r. 17 applies, so far as is practicable, the rules of appeal to the Court of Appeal to appeals from County Courts, and since by Ord. LVIII. r. 1, appeals to the Court of Appeal are to be by notice of motion in a summary way, no other proceeding being necessary, the question arose whether or not the grounds of appeal should be given in notices of motion in appeals from County Courts, as provided in Ord. LIX. r. 10. Justices Hawkins and Wills held the affirmative (*h*), it not being practicable, in appeals from inferior Courts, to follow the practice on appeal to the Court of Appeal. The old cases which decided that no objection can be taken, at the hearing of an appeal, to the jurisdiction of the Court on the ground that the notice contained no statement of the grounds of appeal, will therefore no longer apply (*i*).

(*c*) 38 & 39 Vict. c. 50, s. 6.

(*d*) Per Mellor and Lush, JJ., in *Turner* v. *G. W. Rail. Co.* (1877), 2 Q. B. D. 125; 46 L. J. Q. B. 226; 35 L. T. 809.

(*e*) (1884), 13 Q. B. D. 403; 53 L. J. Q. B. 439; 50 L. T. 776.

(*f*) *Shapcott* v. *Chappell* (1883), 12 Q. B. D. 58; 53 L. J. Q. B. 77; 32 W. R. 183, *questioned*.

(*g*) 47 J. P. 727.

(*h*) *Williams* v. *Taperell* (1892), 92 L. T. Jo. 213.

(*i*) *E.g.*, *Cannon* v. *Johnson* (1852), 21 L. J. Q. B. 164, which was curiously decided on a County Court rule (No. 151), which required such grounds to be stated; and *Evans* v. *Matthews* (1857), 26 L. J. Q. B. 166; 3 Jur. N. S. 295, where there was a special case, and it was held that the stating of the grounds of appeal was not a condition precedent to the jurisdiction of the Superior Court, but only a requirement for the information of the judge below.

The Act of 1875 directed that when the appellate Court was not sitting, appeals by way of motion from inferior Courts should be made before a judge sitting in chambers, who could not adjourn the further hearing into Court, but must himself hear and determine it (*k*); but this was not permitted whilst the appellate Court was actually sitting (*l*). Formerly judge could hear when no Court sitting.

Now, appeals from County Courts are heard by motion by Divisional Courts (*m*), notice being entered at the Crown Office Department of the Central Office (*n*) by lodging a copy of the notice of motion, together with a further copy for the use of the Court. Now by notice lodged at C. O. Department.

It is now also the duty of the appellant to furnish the Court with a copy of the County Court judge's notes, Ord. LIX. s. 13, which makes it the duty of the Master of the Crown Office to apply to the judge for such copy, being repealed by sect. 121 of the County Courts Act of 1888 (*o*), the statement in the headnote of the case cited, that such duty on the part of the appellant is "a condition precedent to the appeal being heard," being apparently not borne out by the judgment.

But though put in the Crown paper, County Court appeals are not Crown cases within the rule which forbids appeals *in formâ pauperis* from the Crown side of the Queen's Bench Division, that rule being only applicable to Crown cases pure and simple, *i.e.*, between Crown and subject, and not between parties (*p*).

Rule 216 of the Crown Office Rules, 1886, applies Ord. LVIII. of the R. S. C., 1883, to all civil proceedings on the Crown side, including Mandamus, Prohibition and Quo Warranto (*q*). Rule 216, C. O. R.

A notice of motion on the ground of misdirection should state how, and in what manner, the judge misdirected the jury. So, where the only objection stated was "misdirection," Huddleston and Manisty, JJ., considered it too If for misdirection notice must give particulars.

(*k*) 38 & 39 Vict. c. 50, s. 6; *Button* v. *The Woolwich Building Society* (1879), 5 Q. B. D. 88; 49 L. J. Q. B. 249; 42 L. T. 54; 28 W. R. 136.

(*l*) *Brown* v. *Shaw* (1876), L. R. 1 Ex. D. 425.

(*m*) Jud. Act, 1873, s. 45; County Courts Act, 1888, s. 120; R. S. C., Ord LIX. rr. 1 (c), 10—17.

(*n*) Ord. LIX. r. 11.

(*o*) *McGrah* v. *Cartwright* (1889), 23 Q. B. D. 3; 58 L. J. Q. B. 331; 60 L. T. 537; 37 W. R. 619.

(*p*) ——*Clements* v. *L. & N. W. Rail. Co.*, (1894) 2 Q. B. 482; 9 R. 223; 58 J. P. 816; 10 T. L. R. 324; 42 W. R. 338; citing *Mulleneisen* v. *Coulson* (1888), 21 Q. B. D. 3, as authority on the rule.

(*q*) Ord. LVIII. of the Rules of the Supreme Court is set out at pp. 52, 53, 64, 65, *infra*.

vague (*r*), following *Drayson* v. *Andrews* (*s*). The decision was given under Ord. XXXIX. r. 3, which provides that—"Every application for a new trial shall be by notice of motion. The notice shall state the grounds of the application, and whether all or part only of the verdict or findings is complained of."

And the Court considered the notice should say how, and in what manner, the jury were misdirected, and that an amendment ought not to be allowed when it is seen that the grounds suggested are absurd, or do not go to the ground of the inquiry or of the right in question.

Effect of death of party.

Where, on an appeal being brought from a County Court, one of the parties dies, after entry of the appeal, the High Court has jurisdiction to give leave to add the personal representative of the party so dying, and application need not be made to the County Court (*t*). So, in the old case of *Hemming* v. *Williams* (*u*), where defendant died before the hearing of plaintiff's appeal, the Court allowed the plaintiff to proceed after giving the notice prescribed by sect. 166 of the Common Law Procedure Act, 1852.

Security for costs.

The statute 13 & 14 Vict. c. 61, s. 14, required the party appealing to give notice of appeal, and security for costs, within ten days; but the Court of Common Pleas held, in *Parkgate Iron Co.* v. *Coates* (*x*), that these were not conditions precedent to the jurisdiction of the Court to hear the appeal, and might be waived by the respondent.

And so with regard to the old Rule 193 of 1867, which required the appellant to transmit his case within three days of its being signed (*y*).

Security may now, by Ord. LVIII. r. 15, be ordered to be given, under special circumstances, by the Court of Appeal, and the time within which appeals must now be brought is directed by the rules (*z*).

Security was ordered to be given by the best friend of an

(*r*)——*Pfeiffer* v. *The Midland Railway* (1886), 18 Q. B. D. 243; 35 W. R. 335. See also *Murfett* v. *Smith* (1887), 12 P. D. 116; 56 L. J. P. 374. *Taplin* v. *Taplin* (1888), 13 P. D. 100; 57 L. J. P. 79; 37 W. R. 256; 58 L. T. 925; 52 J. P. 406.

(*s*) (1854), 10 Ex. 472; 24 L. J. Ex. 22; 18 Jur. 1057.

(*t*) Per Wills and Wright, JJ., in *Blakeway* v. *Patteshall*, (1894) 1 Q. B. 247. Similar leave was given in the two unreported cases, *Williams* v. *Line* (1891), and *Myers* v. *Wilson* (1892).

(*u*) (1871), L. R. 6 C. P. 480; 40 L. J. C. P. 270; 24 L. T. 755.

(*x*) (1870), L. R. 5 C. P. 634; 39 L. J. C. P. 317; 22 L. T. 658; 18 W. R. 928.

(*y*) *Richardson* v. *Silvester* (1873), 29 L. T. 395; 22 W. R. 74.

(*z*) See p. 76, *infra*.

infant who was appealing, but from whom the successful party in the Court below could not get his costs, owing to the best friend's insolvency (*a*).

Applications for security are made under Crown Office Rule 255, upon two clear days' notice of motion,—being brought on as if they were *ex parte* motions, and not put into the Crown paper.

Waiver by guardian.

Waiver of the right of appeal by the guardian of an infant is a matter beyond the ordinary conduct of the action, and, to be binding, must be for the benefit of the infant (*b*).

Appellate Jurisdiction Act, 1876.

Where interpleader proceedings were transferred under the Judicature Act, 1884, s. 17, from the Queen's Bench Division to a County Court, and on appeal the Queen's Bench Division affirmed the County Court judgment, but gave leave to appeal to the Court of Appeal, it was held, in the House of Lords, that the Court of Appeal had jurisdiction under the Judicature Act, 1873, sect. 45, to hear the appeal, that jurisdiction not having been taken away by the Appellate Jurisdiction Act, 1876, sect. 20 (*c*).

Service of notice.

The notice of appeal from a County Court, in the case of an action which has been remitted from the High Court, should be served on the local solicitor, whose name and address for service are given upon the particulars filed in the County Court. Service on the London agent, whose name and address for service appears on the original writ in the High Court, is not sufficient to satisfy Ord. LIX. r. 12 (*d*).

Nor, where the solicitor to the respondent carries on business in the country, will service of notice of motion on his London agent satisfy the terms of the Order (*e*).

Time for appealing.

The twenty-one days within which the notice of motion must be served, and the appeal entered, is to be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or from the time when the finding or refusal is made (*f*), and before the day mentioned in

(*a*) *Swain* v. *Follows* (1887), 18 Q. B. D. 585; 56 L. J. Q. B. 310; 56 L. T. 335; 35 W. R. 408.

(*b*) *Rhodes* v. *Swithenbank* (1889), 22 Q. B. D. 577; 58 L. J. Q. B. 287; 60 L. T. 856; 37 W. R. 457.

(*c*)—*Thomas* v. *Kelly* (1888), 13 App. Cas. 506; 58 L. J. Q. B. 66; 37 W. R. 353; 60 L. T. 114; following *Crush* v. *Turner* (1878), 3 Ex. Div. 303; 47 L. J. Ex. 639; 38 L. T. 595; 26 W. R. 673.

(*d*) *Malley* v. *Shepley* (1893), 68 L. T. 294; 41 W. R. 63; 5 R. 78; 62 L. J. Q. B. 31.

(*e*)—*Jackson* v. *Margrett* (1893), 68 L. T. 91; 5 R. 181; 41 W. R. 267. *Powell* v. *Thomas*, (1891) 1 Q. B. 97; 63 L. T. 812; 39 W. R. 224.

(*f*) R. S. C., Ord. LIX. r. 12.

Time for appealing —(*contd.*).

the notice, if that falls before the twenty-first day (*g*). But where the finding of a jury in a County Court is complained of, the twenty-one days are to be calculated from the time when the verdict was given, though judgment upon it was deferred till a later date (*h*).

Where, in order to enable a plaintiff to appeal within the eight days prescribed by the County Courts Act of 1875, the judge permitted his judgment, delivered on April 18th, to be entered as delivered on May 2nd, it was held that the appeal was not brought within eight days of the "ruling, order, direction, or decision," as prescribed by the Act (*i*). But an appeal was held to be in time where a non-suit had been entered at the trial, and the notice had been given within the prescribed time from the date of a refusal of the County Court judge to set aside the non-suit (*k*).

Where the time has elapsed, an extension will not readily be granted (*l*), even though it may appear that the parties attended at the office to execute the necessary documents in time, but did not complete them (*m*). Still less will it be granted if the time has elapsed before the parties attended (*n*).

But the Court has discretion as to granting an extension of time, the Court of Appeal holding, in *Cusack* v. *L. & N. W. Rail.* (*o*), that the decision in *Reg.* v. *Kettle* (*p*) was not intended to lay down otherwise, and dissenting from *Collins* v. *Vestry of Paddington* (*q*), where a distinction was recognized between applications for an extension of time previous to the trial of the action and those for appealing after judgment, there being in truth no ground for any such distinction to govern the exercise of the discretion vested in the Court.

Where a notice of motion of appeal was given for a day not in the sittings of the Court, the Court of Appeal still held that the notice was good (*r*), overruling *Daubney* v.

(*g*)——*Donovan* v. *Brown* (1879), 4 Ex. D. 148; 48 L. J. Ex. 456; 27 W. R. 648, following *In re National Funds Assurance Co.* (1876), 4 Ch. D. 305; 46 L. J. Ch. 183; 35 L. T. 689; 25 W. R. 151, 158.

(*h*) *Rawnsley* v. *Lancashire and Yorkshire Railway*, C. A. (1887), 35 W. R. 771.

(*i*) *Wilberforce* v. *Sowton* (1878), 48 L. J. C. P. 28; 39 L. T. 474.

(*k*) *Hemming* v. *Blanton* (1873), 42 L. J. C. P. 158; 21 W. R. 636.

(*l*) *Cook* v. *Jones* (1861), 9 W. R. 618.

(*m*) *Francis* v. *Dowdeswell* (1874), 9 C. P. 423; 43 L. J. C. P. 248; 30 L. T. 607; 22 W. R. 755.

(*n*) *Ward* v. *Raw* (1872), L. R. 15 Eq. 83; 27 L. T. 601; 21 W. R. 116.

(*o*) (1891) 1 Q. B. 347; 60 L. J. Q. B. 208; 64 L. T. 45; 39 W. R. 244; 55 J. P. 341.

(*p*) (1886), 17 Q. B. D. 761; 55 L. J. Q. B. 470; 54 L. T. 875; 34 W. R. 776.

(*q*) (1880), 5 Q. B. D. 368.

(*r*) *In re Coulton* (1886), 34 Ch. D. 22; 56 L. J. Ch. 312; 55 L. T. 464; 35 L. T. 464; 35 W. R. 49.

Shuttleworth (*s*), and in similar circumstances an amendment was permitted (*t*).

In applications for a new trial, time runs from the granting or refusal of the application, that being an interlocutory matter from which, under the present Act, a right of appeal exists (*u*). Time for applications for new trials.

Before the Act of 1888 permitted such appeals the practice was different, it being held, where a new trial was applied for and refused, that the time for bringing an appeal must be reckoned from the date of the judgment, and not from that of the refusal to grant a new trial (*x*), and this even where the County Court judge had caused the delay by taking a fortnight to consider his decision, thus putting the appeal from the judgment out of time (*y*).

But where judgment was given for defendant, leave being reserved for plaintiff to move to enter a verdict for him or for a new trial, and notice of appeal was given, Martin, B., held that plaintiff's right of appeal was to be reckoned from the day the motion was refused, and not from the day of the trial, as there had been no final determination or direction in point of law until the judge pronounced judgment on the motion to enter the verdict or for a new trial (*z*).

The Crown Office Rules of 1886 (*a*) provide that applications for a new trial, or to enter judgment *non obstante veredicto*, or to arrest judgment where such applications may by law be made, are to be by motion for an order *nisi*. Such motion is to be made to a Divisional Court of the Queen's Bench Division, and, in cases tried in London or Middlesex, within eight days after the trial or on the first subsequent day on which a Divisional Court shall sit to hear motions on the Crown side; or if the trial has been heard at the assizes, within the first seven days after the last day of the sittings on the circuits for England and Wales. The time of the vacations is not to be reckoned in the computation of time for moving.

In either case the time may be extended by the Court or a

(*s*) (1876), 1 Ex. D. 53; 45 L. J. Ex. 177; 34 L. T. 357; 24 W. R. 321.
(*t*) *Williams* v. *De Boinville* (1886), 17 Q. B. D. 180; 54 L. T. 732; 34 W. R. 702.
(*u*) *Pole* v. *Bright*, (1892) 1 Q. B. 603; 65 L. T. 748; 40 W. R. 95; 61 L. J. Q. B. 139; and see other cases cited on pp. 33, 34. *supra*.
(*x*)——*McHardy* v. *Liptrott* (1887), 19 Q. B. D. 151; 56 L. J. Q. B. 459.
Jacobs v. *Dawkes* (1887), 56 L. J. Q. B. 446; 56 L. T. 919; 35 W. R. 649.
(*y*) *Morris* v. *Lowe* (1885), 34 W. R. 45.
(*z*) *Foster* v. *Green* (1861), 30 L. J. Ex. 263; 6 H. & N. 793.
(*a*) Rule 166.

judge, the grounds upon which the order is granted being stated in the order (*b*), a copy of which must be served on the opposite party within four days from the time of its being granted (*c*).

It is no objection to a new trial that a juror was withdrawn at the trial, upon terms, if the latter have not been carried out (*d*).

Applications:—
For time;
To strike out;
For special case;
To accelerate;
In *quo warranto*;
In criminal information.

Applications—

(a) For time, enlargement, stay, or security;
(b) To strike a case out of the Crown paper;
(c) To file a special case by leave of the Court;
(d) To accelerate a case in the Crown paper on the ground of urgency;
(e) To substitute a new relator, on an information *quo warranto*, for the original relator;
(f) For costs to a defendant in criminal information to the amount of the recognizance;

should be made upon two clear days' notice of motion, and be brought on as if they were *ex parte* motions, and not put into the Crown paper (*e*).

Evidence.

And when any such motion is made and founded on evidence by affidavit, a copy of such affidavit intended to be used shall be served with the notice of motion (*f*).

Orders.

Rule 258 provides that "no order on the Crown side, except orders of course, shall be drawn up without the leave or order of the Court, of a judge, or of the Queen's Coroner and Attorney, or the Master of the Crown Office" (*g*).

Hearing.

And if, on the hearing of a motion or other application, the Court or a judge is of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or judge may dismiss the motion or application, or adjourn the hearing thereof, in order that such notice may be given upon such terms, if any, as the Court or judge may think fit to impose (*h*).

It was decided, on the introduction of appeals by motion, that the old practice will be adhered to of hearing only one counsel on each side in appeals from inferior Courts; counsel for appellant opening, and replying after counsel for respon-

(*b*) C. O. R. 167 of 1886.
(*c*) C. O. R. 168 of 1886.
(*d*) *Thomas* v. *Exeter Flying Post* (1887), 18 Q. B. D. 822; 56 L. J. Q. B. 313; 56 L. T. 361; 35 W. R. 594.
(*e*) C. O. R. 255 of 1886.
(*f*) C. O. R. 256 of 1886.
(*g*) C. O. R. 258.
(*h*) C. O. R. 260 of 1886.

dent has argued in support of the judgment (*i*). But two counsel are heard on each side in the Court of Appeal (*k*).

Ord. XXXIII. of the Rules of the Supreme Court, 1883, is, as far as it is applicable, to apply to all civil proceedings on the Crown side (*l*).

On affidavits generally.

In all proceedings on the Crown side:—"Upon any motion or summons, evidence may be given by affidavit; but the Court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit" (*m*).

"Affidavits used on the Crown side must be intituled 'In the High Court of Justice, Queen's Bench Division,' and must be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted."

The costs of every affidavit which unnecessarily sets forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, will have to be borne by the party who filed them (*n*), and no affidavit can be used without leave of the Court or judge if filed after the time limited (*o*).

The general rules issued for use in County Courts cannot be modified by the practice established by the judge of a particular Court (*p*).

(*i*) *Hawes* v. *Peake* (1876), 33 L. T. 818; 24 W. R. 407.

(*k*) *Sneesby* v. *L. & Y. Railway* (1875), 1 Q. B. D. 42; 45 L. J. Q. B. 1. *Hoare* v. *Bremridge* (1872), 21 W. R. 43; 42 L. J. Ch. 1; 27 L. T. 593.

(*l*) C. O. R. 5 of 1886.

(*m*) C. O. R. 6 of 1886.

(*n*) C. O. R. 9 of 1886.

(*o*) C. O. R. 23 of 1886.

(*p*) *The Cashmere* (1890), 15 P. D. 121; 59 L. J. P. 57; 62 L. T. 814; 38 W. R. 623.

In the old case of *Tattersall* v. *Fearnley* ((1856), 17 C. B. 369), Jervis, C. J., observed that materials for hearing County Court appeals must be supplied for the use of all the members of the Court. In *Fallows* v. *Slatter* ((1869), 20 L. T. 104), it was held, that every appeal from the County Courts ought to be accompanied by a case containing a statement of the facts, and the grounds of the appeal. In *Slattery* v. *Axton* ((1866), 14 L. T. N. S. 510), the Vice-Chancellor declined to proceed with an appeal until a case had been submitted by the judge; and this was followed in the case of *Railton* v. *Easy* (1869), 19 L. T. N. S. 715. And the judge was bound to sign a case for appeal if it correctly stated the facts and the judgment (*Irving* v. *Askew* (1870), L. R. 5 Q. B. 209); and a rule would issue against him to show cause for his refusal (*Clarke* v. *Roche* (1877), 36 L. T. N. S. 78); or compel him to do so, or to amend a note if one was incompletely made (*Gt. E. Rail. Co.* v. *Giddons* (1880), 44 J. P. 284; *Furber* v. *Sturmy* (1858), 4 Jur. 956); although the granting or refusing such a rule was discretionary. (*Sharrock* v. *L. & N. W. Rail. Co.* (1875), 1 C. P. D. 70.)

CHAPTER X.

POWERS OF APPELLATE COURT—REVERSAL OF JUDGMENT AND AWARD OF DAMAGES.

Power of appellate Court.

THE appellate Court may draw any inference of fact, or order a new trial, or order judgment to be entered for any party, or make any final or other order or judgment as it may think proper, to ensure the determination on the merits of the real questions in controversy between the parties (*a*).

A substantial wrong or miscarriage must, however, be perceived to have been occasioned before an appellate Court will permit a motion by way of appeal to succeed (*b*).

Ord. LVIII. r. 1.

All appeals come before the appellate Court by way of rehearing (*c*), and so such judgment will be given as should be given if the case came at that time before the Court of first instance (*d*).

Discharge of order.

Where an order has been made against a party, he may apply by motion *ex parte* to discharge the order, though it has been passed and entered (*e*).

Ord. LVIII. r. 2. Service on other persons.

The appellate Court may direct notice of an appeal to be served upon any person not a party, and postpone or adjourn the hearing in the meantime (*f*); and possesses all the powers and duties of amendment and otherwise of the High Court, with full discretionary power to receive further evidence upon questions of fact, oral or by affidavit or by deposition, taken before an examiner or commissioner (*g*). Such further evidence may be given without special leave upon interlocutory applications, or as to matters which have occurred after

Ord. LVIII. r. 4. Further evidence.

(*a*) 51 & 52 Vict. c. 43, s. 122; R. S. C., Ord. LIX. rr. 7 *et seq*; Ord. LVIII. r. 4.

(*b*) R. S. C., Ord. LIX. r. 7.

(*c*) R. S. C., Ord. LVIII. r. 1.

(*d*) *Quilter* v. *Mapleson* (1882), 9 Q. B. D. 672; 52 L. J. Q. B. 44; 47 L. T. 562; 31 W. R. 75.

(*e*) *Boyle* v. *Sacker* (1888), 39 Ch. D. 249; 58 L. T. 822; 37 W. R. 68.

(*f*)——R. S. C., Ord. LVIII. r. 2; *Purnell* v. *G. W. Railway* (1876), 1 Q. B. D. 636.

Hunter v. *Hunter* (1876), 24 W. R. 527.

(*g*) R. S. C., Ord. LVIII. r. 4.

the date of the decision appealed against. But it will only be admitted on special grounds by special leave in appeals from judgments after trial (*h*).

If, on hearing an appeal, the Court considers a new trial should be had, it may set aside the verdict and judgment and order the new trial (*i*). Ord. LVIII. r. 5.

A respondent need not give notice by way of cross-appeal; but if he intends to contend that the decision below should be varied he must give notice to the parties interested; and whilst omission to give such notice will not diminish the powers of the Court, it may be ground for an adjournment or for a special order as to costs (*k*). Ord. LVIII. r. 6. Cross-appeals.

Where an *ex parte* application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a judge of the Court below, or of the Court of Appeal, may allow (*l*). Ord. LVIII. r. 10.

When necessary, as Lush, J., said (*m*), the appellate Court will act upon the wholesome provision of the Judicature Act, 1875 (*n*), and direct that the judgment for the plaintiff below be set aside and judgment entered for the defendant. Setting aside judgment.

It was frequently held that this could be done under the County Courts Act of 1845 (*o*), or a non-suit entered where judgment was given for plaintiff in the County Court (*p*).

The appellate Court will order judgment to be entered as, upon hearing the whole of the evidence, it considers it ought to have been given by the County Court judge; or it may assess the damages (*q*). If the facts do not sufficiently establish the judgment, it will be reversed (*r*). Proper judgment will be entered.

And where the County Court judge wrongly non-suits the plaintiff, the High Court, to prevent further litigation, may

(*h*) *Ibid.*
(*i*) R. S. C., Ord. LVIII. r. 5.
(*k*) *Ibid.* r. 6.
(*l*) *Ibid.* r. 10. All the paragraphs, *supra*, which are cited as being based on this Order (Ord. LVIII.), are subject to the terms of the rule, which makes Ord. LVIII. applicable "so far as is practicable": *i.e.*, Ord. LIX. r. 17. See also C. O. R. 216.
(*m*) *Eastland* v. *Burchell* (1878), 3 Q. B. D. 432; 47 L. J. Q. B. 500; 38 L. T. 563.
(*n*) And Ord. XL. r. 10.
(*o*) 13 & 14 Vict. c. 61, s. 14. See *Whiteman* v. *Hawkins* (1879), 4 C. P. D. 13; 39 L. T. 629; 27 W. R. 262.
(*p*) *Fuller* v. *Cleveley* (1853), 17 Jur. 736.
(*q*) *King* v. *The Oxford Co-operative Society* (1884), 51 L. T. 94.
(*r*) *Snowden* v. *Baynes* (1890), 24 Q. B. D. 568; 59 L. J. Q. B. 325; 38 W. R. 558; upheld on appeal, 25 Q. B. D. 193; 59 L. J. Q. B. 558; 38 W. R. 744.

fix a nominal sum for damages which the County Court judge ought to have fixed (*s*).

But verdict of jury will stand if justified.

But where the jury in the County Court have given a general verdict for damages, without answering the specific questions put to them by the judge, the appellate Court will not reverse their finding and damages if there was some evidence to go before them on which such a verdict could be supported (*t*).

So, also, where there was evidence upon which the County Court judge might not unreasonably have arrived at the finding that he in fact arrived at, the appellate Court will uphold his judgment (*u*).

(*s*) *Churchward* v. *Johnson* (1890), 54 J. P. 326.
(*t*) *Amos* v. *Duffy* (1890), 4 T. L. R. 339.
(*u*) *Le Blanche* v. *L. & N. W. Railway* (1876), 1 C. P. D. 286; 45 L. J. C. P. 521; 34 L. T. 667; 24 W. R. 808.

CHAPTER XI.

APPEALS FROM DIVISIONAL COURTS TO THE COURT OF APPEAL.

Second appeals.

Only by leave of Divisional Court.

Judicature Act, 1894.

Or of Court of Appeal.

THE determination by a Divisional Court of an appeal from a County (or other inferior) Court is final, unless special leave to appeal to the Court of Appeal be given by the Divisional Court by which such appeal has been heard (*a*), the meaning of which rule, Lord Esher, M.R., said (*b*), was to confine the power to give leave to appeal absolutely to Divisional Courts. But now, by the Judicature Act, 1894, sect. 1, sub-sect. 5, leave may be given by the Court of Appeal as well as by the Divisional Court. The Court of Appeal may be applied to *ex parte*, notwithstanding *Ex parte Stevenson* (*c*), the rule of practice being to refuse such leave unless the applicant can show, clearly and briefly, without going through all the evidence, that injustice has been done (*d*). Prior to this Act, the Court of Appeal had no power to give leave to an applicant who had been refused by the Divisional Court (*e*).

It was held in 1878 that, notwithstanding the Appellate Jurisdiction Act of 1876, sect. 20, an appeal lay to the Court of Appeal from the decision of a Divisional Court if special leave were given to appeal under the Judicature Act, 1873, sect. 45, upon a case stated by a County Court judge under 13 & 14 Vict. c. 61, s. 14 (*f*).

Conditional leave.

Leave may be given conditionally upon security being lodged within a stated time (*g*).

(*a*) Judicature Act, 1873, s. 45; *Ex parte Schofield*, (1891) 2 Q. B. 428; 60 L. J. M. C. 157; 64 L. T. 780; 39 W. R. 580; 56 J. P. 4; 7 T. L. R. 615; 17 Cox, C. C. 303.

(*b*) *Kay* v. *Briggs* (1889), 22 Q. B. D. 343; 58 L. J. Q. B. 182; 60 L. T. 775; 37 W. R. 291.

(*c*) (1892) 1 Q. B. 609; 61 L. J. Q. B. 492; 66 L. T. 544; 44 W. R. 417; 56 J. P. 501; 8 T. L. R. 232: affirming, (1892) 1 Q. B. 394; 56 J. P. 408.

(*d*) *Hawkins* v. *G. W. Railway* (1895), 14 R. 360.

(*e*) *Kay* v. *Briggs* (1889), 22 Q. B. D. 343; 58 L. J. Q. B. 182; 60 L. T. 775; 37 W. R. 291.

(*f*) *Crush* v. *Turner* (1878), 3 Ex. D. 303; 47 L. J. Ex. 639; 38 L. T. 595; 26 W. R. 673.

(*g*) As in *Whatley* v. *Holloway* (1890), 62 L. T. 639; 54 J. P. 645.

No leave required in prohibition.

But an appeal lies without leave from the decision of a Divisional Court upon an application for a prohibition to a County Court, Fry and Lopes, L.JJ., agreeing that this right existed before the County Courts Act, 1888, and that sect. 128 of that Act left that right as it was before (*h*).

Actions sent down for trial.

Since an action which had been sent for trial to a County Court under sect. 26 of 19 & 20 Vict. c. 108, did not thereby become a cause in the County Court, but remained in the High Court, an appeal was held to lie from the judgment of a Divisional Court, without special leave being obtained, under sect. 45 of the Judicature Act, 1873 (*i*).

In the case last cited, *Bowles* v. *Drake* (*k*) was relied on to show that there was no appeal, without leave of the Divisional Court, where the action had been sent to the County Court for trial under 30 & 31 Vict. c. 142; and it was contended that there was no difference where the action had been sent for trial under sect. 26 of 19 & 20 Vict. c. 108.

Against this a number of cases were cited (*l*); and Brett, L.J., considering the two enactments—*i.e.*, sect. 26 of 19 & 20 Vict. c. 108, and sect. 7 of 30 & 31 Vict. c. 142—recognized the general similarity of the conditions under which the Court would act under both sections, but thought that sect. 7 of 30 & 31 Vict. c. 142, was not inconsistent with sect. 26 of 19 & 20 Vict. c. 108, and both sections could be read together, it following that sect. 26 of the earlier Act was not impliedly repealed by the later Act, 30 & 31 Vict. c. 142.

In *Bowles* v. *Drake* (*m*), it was decided that an appeal would not lie, the Court relying on the terms of the latter part of sect. 10 of 30 & 31 Vict. c. 142, and that case decided that there is no appeal without special leave in all cases within sects. 7, 8 and 10 of 30 & 31 Vict. c. 142, which are to be treated as if the actions had been originally commenced in the County Court. But no such words were contained in sect. 26 of 19 & 20 Vict. c. 108, and under that section the

(*h*) *Lister* v. *Wood* (1889), 23 Q. B. D. 229; 37 W. R. 738; 53 J. P. 773.

(*i*)——*Babbage* v. *Coulbourn* (1882), 52 L. J. Q. B. 50; 46 L. T. 515: approving *Balmforth* v. *Pledge* (1866), L. R. 1 Q. B. 427; 35 L. J. Q. B. 169; 12 Jur. N. S. 644. See judgment of Brett, L. J., and cases there cited.

(*k*) (1881), 8 Q. B. D. 325; 51 L. J. Q. B. 66; 45 L. T. 576; 30 W. R. 333.

(*l*)——*Wheatcroft* v. *Foster* (1858), E. B. & E. 737; 27 L. J. Q. B. 277.
Balmforth v. *Pledge* (1866), *ubi sup.*
Osborne v. *Homburg* (1875), L. R. 1 Ex. D. 48; 45 L. J. Ex. 65.
Foster v. *Usherwood* (1877), L. R. 3 Ex. D. 1; 47 L. J. Ex. 30; Wilson's Judicature Acts, 3rd ed., p. 71.

(*m*) (1881), 8 Q. B. D. 325; 51 L. J. Q. B. 66; 45 L. T. 576; 30 W. R. 333.

County Court judge might only try the case; he could not give judgment, for the Registrar was to certify the result to the Master's Office of the Supreme Court, and the judgment was to be signed in the Supreme Court in accordance with the certificate.

As Lush, J., had said in *Balmforth* v. *Pledge* (*n*), sect. 26 only says that the cause is to be sent for trial to the County Court, the judge of which has only to try it, when he becomes *functus officio*,—all jurisdiction as to new trials remaining vested in the Court out of which the writ issued.

Brett, L.J., added that an appeal would therefore lie from a Divisional Court, and sect. 26 did not render it necessary that any special leave should be obtained under sect. 45 of the Judicature Act, 1873.

Cotton, L.J., agreed that an action sent for trial under sect. 26 of 19 & 20 Vict. c. 108, was different from one sent for trial under sects. 7, 8 and 10 of 30 & 31 Vict. c. 142, and no leave was necessary to appeal from the judgment of the Divisional Court (*o*).

(*n*) (1866), L. R. 1 Q. B. 427; 35 L. J. Q. B. 169; 12 Jur. N. S. 644.

(*o*) For the sections of the Act of 1888 relating to remitted actions and conclusions as to the right of appeal existing in connection therewith, see p. 8, *ante*.

CHAPTER XII.

APPEALS FROM THE MAYOR'S COURT.

Mayor's Court Act of 1857, s. 8.

If either party appearing on the trial of any cause in which the sum sought to be recovered "(1) shall exceed 20*l.*, be dissatisfied with (2) the determination or direction of the Court in point of law, or upon (3) the admission or rejection of any evidence, he may appeal from the same to the High Court, provided that he (1) within two days after such determination or direction (2) give notice of appeal to the other party or his solicitor, and also (3) give security within such time or times as the Court shall direct, to be approved of by the registrar of the Court (if the judge shall so direct), for the costs of the appeal, whatever be its event, and for the amount of the judgment if he be defendant, and the appeal be dismissed."

Such security, however, so far as regards the amount of the judgment, is not to be required where the judge of the Court has ordered the party appealing to pay the amount of such judgment into the hands of the registrar, and the same shall have been paid accordingly.

And the appellate Court may either "(1) order a new trial on such terms as it shall think fit; or (2) order judgment to be entered for either party (as the case may be); and (3) make such order as to the costs of the appeal as it may think proper."

And such orders will be final (*a*).

It is a condition precedent to the right of appeal that the appellant should have given security for the costs of the appeal as provided for by this section, which has not been repealed by Ord. LIX. rr. 10—17, R. S. C. (*b*).

The Mayor's Court being an inferior Court (*c*) appeals from

(*a*) Mayor's Court Procedure Act, 1857, s. 8.

(*b*) *Morgan* v. *Bowles*, (1894) 1 Q. B. 236; 10 R. 62; 63 L. J. Q. B. 84; 42 W. R. 269.

(*c*)——*Mayor of London* v. *Cox* (1866), L. R. 2 H. L. 239; 36 L. J. Ex. 225; 16 W. R. 44.

Appleford v. *Judkins* (1878), 3 C. P. D. 489; 47 L. J. C. P. 615; 38 L. T. 801; 26 W. R. 734.

it will lie to the High Court, and should be brought by motion to the Divisional Court as directed by Ord. LIX., R. S. C.

Appeals from Divisional Court to Court of Appeal.

Similarly, the decision of the Divisional Court, on appeal from the Mayor's Court, will be final, and no appeal will lie to the Court of Appeal unless special leave be given (*d*).

Setting aside verdict.

Sect. 10 of the Mayor's Court Procedure Act, 1857, provides that the parties in any case in the Mayor's Court may, if the judge grants leave, move in the superior Courts to set aside the verdict. But it has been held (*e*) that Ord. LIX. r. 10, which provides that all appeals from inferior Courts shall be by notice of motion, does not make it necessary, where the sum sought to be recovered in the Mayor's Court exceeds 20*l.*, and a motion to set aside the verdict and judgment on the ground of misdirection is made in the High Court, that leave of the judge of the Mayor's Court should be obtained.

The practice as to the notice, the motion, and its hearing will, in consequence of the application of Ord. LIX., R. S. C., be similar in appeals from the Mayor's Court to that which obtains in appeals from County Courts, and which has already been considered (*f*).

Judge's note.

There is no provision in the Mayor's Court Procedure Act, 1857, for the taking of a note by the judge at the request of either party for purposes of appeal. Sect. 9 did, indeed, provide that such appeals should be in the form of a case agreed on by both parties or their attorneys; but the effect of Ord. LIX. in causing appeals to be by motion, and the absence of an amending Act supplying a special form of procedure in place of the case (such as was supplied by the County Courts Act, 1875, and its successor of 1888), would appear to leave appeals from the Mayor's Court to be heard on such materials as may be forthcoming, and as are usually presented in appeals from inferior Courts to the High Court.

Sect. 10.

The 10th section of the Mayor's Court Procedure Act, 1857, provides that—"if upon the trial of any issue the judge shall grant leave to the plaintiff or defendant to move in any of the superior Courts to set aside a verdict or a non-suit, and to enter a verdict for the plaintiff or defendant, or to enter a non-suit (as the case may be), or for a new trial, the party to whom such leave may have been given may apply by motion to such superior Court within such period of time after the trial as motions of the like kind shall from time to time be permitted to be made in such superior Court for a rule to show cause why such verdict or non-suit should not be set

(*d*) *Appleford* v. *Judkins* (1878), *ubi sup.*; Judicature Act, 1873, s. 45.
(*e*) *Eder* v. *Levy* (1887), 19 Q. B. D. 210; 56 L. J. Q. B. 650.
(*f*) *Vide* p. 42 *et seq.*, *supra*.

aside and a verdict entered for the plaintiff or defendant, or a non-suit entered, or why a new trial should not be had (as the case may be) in such action."

And such Court is empowered to grant or refuse such rule (which rule, when granted, will operate as a stay of proceedings until the determination thereof), and afterwards to proceed to hear and determine the merits thereof, and to make such orders thereupon, and as to costs, as the same Court shall think proper.

And in case such Court shall order a new trial to be had in any such action, the party obtaining such order shall deliver the same, or an office copy thereof, to the registrar of the said Court; and thereupon all the proceedings on the former verdict or non-suit shall cease, and the action shall proceed to trial according to the practice of the Court, in like manner as if no trial had been had therein.

Or, in case the Court before whom such rule shall be heard, shall order the same to be discharged, the party obtaining such order may, upon delivering the same, or an office copy thereof, to the registrar, be at liberty to proceed in any such action as if no such rule *nisi* had been obtained.

And if a verdict be ordered to be entered for the plaintiff or defendant, or a non-suit be ordered to be entered (as the case may be) judgment shall be entered accordingly.

CHAPTER XIII.

APPEALS IN BANKRUPTCY.

Bankruptcy Appeals (County Courts) Act, 1884.

The Bankruptcy Appeals (County Courts) Act, 1884 (*a*), provides that an appeal shall lie in bankruptcy matters, at the instance of any person aggrieved, from the order of a County Court to a Divisional Court of the High Court of Justice, of which the judge to whom bankruptcy business shall for the time being be assigned shall, for the purpose of hearing any such appeal, be a member.

The decision of such Divisional Court upon any such appeal is final and conclusive, unless leave be given to appeal to the Court of Appeal,

(1) by the Divisional Court, or

(2) by the Court of Appeal.

And the decision of the Court of Appeal is final and conclusive.

Regulation, 18th Feb., 1890.

By the Regulation of 18th February, 1890 (*b*), "(1) Every notice of motion by way of appeal must state the grounds on which it is contended that the order appealed from is erroneous; (2) and any objection that any of such grounds were not taken in the Court below should be taken as a preliminary objection before the argument on that ground of appeal is commenced."

Interlocutory orders on appeal.

When there is an appeal to the High Court from an order of a County Court in a bankruptcy matter, any order or direction incidental thereto, not involving the decision of the appeal, may be given by the judge of the High Court for the time being exercising bankruptcy jurisdiction, but any such order or direction may be discharged or varied by the High Court (*c*).

When leave required.

Except by leave of the Court, no appeal lies to the Court of Appeal from—

(a) any order made by consent;

(b) or as to costs only;

(*a*) 47 Vict. c. 9, s. 2.
(*b*) Set out in 7 Mor. 64.
(*c*) B. R. 134a.

(c) or where the property involved does not exceed 50*l.*;

(d) or from the omission by the Court appealed from to exercise any discretionary power; unless, in its judgment or on application made at the hearing, it shall have expressly refused to exercise such power, in which case an appeal will lie against such refusal (*d*).

Time. Appeals must be lodged within twenty-one days " (1) from the date at which the order is signed, entered, or otherwise perfected; (2) or, in the case of the refusal of an application, from the date of such refusal " (*e*).

Days excepted. Sundays and certain holidays appear to be included in such calculation, but when the last day is a Sunday, Christmas Day, Good Friday, or Monday or Tuesday in Easter Week, or a day appointed for public fast, humiliation, or thanksgiving, or a day on which the Court does not sit (*i.e.*, on which the offices are closed), any act or proceeding will be in time if done on the next day afterwards which is not one of the days specified (*f*).

And where by the Bankruptcy Act or Rules the time limited for doing any act or thing is less than six days, none of the days mentioned are to be counted in computing such time (*g*).

Security for costs. A sum of 20*l.* must be lodged as security for costs by the appellant at or before the time of entering an appeal. But the Court of Appeal may, in any special case, increase or diminish, or entirely dispense with, this deposit (*h*).

Notice on entry. Upon entering his appeal, an appellant must send forthwith a copy of the notice of appeal to the registrar of the Court appealed from, who marks thereon the date of its receipt, and forthwith files it with the proceedings (*i*); and upon the application of the senior Registrar of the High Court transmits the file to him (*k*).

Omission by the appellant to send a copy of the notice of appeal forthwith, upon entering it, to the registrar of the Court appealed from, will not be excused except under special circumstances, and the Court has refused to hear more than one appeal in consequence (*l*).

Ord. LVIII., R. S. C. Subject to these rules, appeals to the Court of Appeal are

(*d*) B. R. 129.
(*e*) B. R. 130.
(*f*) B. A. 1883, s. 141.
(*g*) B. R. 4.
(*h*) B. R. 131.
(*i*) B. R. 132.
(*k*) B. R. 133.
(*l*) *In re Victoria*, (1894) 1 Q. B. 259; 9 R. 132; 63 L. J. Q. B. 161; 70 L. T. 141; 42 W. R. 193; 1 Man. 1.

regulated by Ord. LVIII. of the R. S. C., 1883, and its amendments.

Notice of applications to rescind.

An application to rescind a receiving order, or to stay proceedings thereunder, or to annul an adjudication, is not heard without proof that seven days' notice of it has been served upon the official receiver, together with a copy of the affidavits in support. But the Court may give leave for the notice to be served differently, and may make an *interim* order staying such of the proceedings as it thinks fit (*m*).

Appeals in bankruptcy generally can only lie in conformity with such rules as may for the time being be in force (*n*).

"Court of Appeal" defined.

The term "Court of Appeal" includes any Court to which, under any Act for the time being in force, appeals lie from "the Court," as defined by the Bankruptcy Act, 1883, and the Bankruptcy Rules (*o*).

"The Court."

"The Court" is defined by the Bankruptcy Act, 1883, as meaning the Court having jurisdiction under that Act (*p*); and by the Bankruptcy Rules the term is extended to include a registrar when exercising the powers of the Court pursuant to the Act or Rules (*q*).

In the result, the term "Court of Appeal" must be taken to include a Divisional Court to which appeals are brought from County Courts.

Aggrieved persons.

By sect. 104 of the Bankruptcy Act, 1883 (*r*), every Court having jurisdiction in bankruptcy under that Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction.

Orders in bankruptcy are appealable at the instance of any "person aggrieved."

Lord Justice James' definition of.

In Lord Justice James' opinion (given in a considered judgment), the term "person aggrieved" does not mean a man who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a man who has suffered a legal grievance —a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something (*rr*).

(*m*) B. R. 134b.
(*n*) B. A. 1883, s. 104 (d).
(*o*) B. R. 3 (a).
(*p*) B. A. 1883, s. 168 (1).
(*q*) B. R. 3 (a).
(*r*) 46 & 47 Vict. c. 52.
(*rr*) *Re Sidebotham, Ex parte Sidebotham* (1880), 14 Ch. D. 458; 49 L. J. Bk. 41; 42 L. T. 783; 28 W. R. 715.

Definitions of, in cases.

The following have (*e.g.*) been held to be aggrieved persons, in whom the right of appeal is vested:—

An unpaid creditor (*s*);
Ibid., by an order for registration of a resolution of creditors (*t*);
A bill of sale holder whose title is affected (*u*);
A debtor who has been refused to be heard on a trustee's application (*x*);
Assignees under a deed whose title is affected (*y*);
A trustee, in similar circumstances (*z*);
A person (*e.g.*, the Board of Trade) objecting to the appointment of a trustee (*a*);
Any person who makes application to or is brought before the Court, and has a decision against him (*b*);
Any creditor who satisfies the Court that the order takes away something to which he is entitled, or imposes upon him some liability, though his proof is not admitted or tendered (*c*);
Any creditor who is dissatisfied with the decision of the trustee or official receiver in respect of a proof (*d*).

Judge's note or other material.

Appeals in bankruptcy being given by the Bankruptcy Act, 1883, the Bankruptcy Appeals (County Courts) Act, 1884, and the Bankruptcy Rules, together with Ord. LVIII. of the R. S. C., the provisions as to the production of the judge's note at the hearing of the appeal, as provided by the County Courts Act, 1888, do not appear to apply.

Ord. LVIII. r. 11.

Rule 11 of the Order just mentioned provides that when any question of fact is involved in an appeal, the evidence taken in the Court below bearing on such question shall, subject to any special order, be brought before the Court of Appeal as follows:—

(a) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been

(*s*) *In re Payne* (1886), 3 Mor. 270; 18 Q. B. D. 154; 35 W. R. 89.
(*t*) *In re Webb* (1876), 2 Ch. D. 326.
(*u*) *In re Ellis, Ex parte Thoday* (1876), 2 Ch. D. 229.
(*x*) *In re Webb & Sons* (1887), 4 Mor. 52.
(*y*) *In re Whelan* (1878), 39 L. T. 361; 48 L. J. Bk. 43; 27 W. R. 156.
(*z*) *In re Batten* (1889), 22 Q. B. D. 685; 58 L. J. Q. B. 333; 37 W. R. 499; 6 Mor. 110.
(*a*) *In re Lamb*, (1894) 2 Q. B. 805; 1 Man. 373; 64 L. J. Q. B. 71; 71 L. T. 312; 9 R. 636.
(*b*) *In re Reed, Bowen & Co.* (1887), 19 Q. B. D. 174; 56 L. J. Q. B. 447; 56 L. T. 876; 35 W. R. 660; 4 Mor. 225.
(*c*) *In re Langtry* (1894), 1 Man. 169; 63 L. J. Q. B. 570; 70 L. T. 736; 42 W. R. 496; 10 R. 220.
(*d*) B. R. 24, Sched. 2.

printed, and office copies of such of them as have not been printed;

(b) As to any evidence given orally, by the production of a copy of the judge's notes, or such other materials as the Court may deem expedient (*e*).

Where evidence has not been printed in the Court below, the Court or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole, or any part thereof, to be printed for the purpose of the appeal, and any party printing evidence for the purpose of an appeal without such order shall bear the costs thereof, unless the Court of Appeal or a judge thereof shall otherwise order (*f*). Ord. LVIII. r. 12.

If, upon the hearing of an appeal, a question arise as to the ruling or direction of the judge to a jury or assessors, the Court shall have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient (*g*). Ord. LVIII. r. 13.

An appeal does not operate as a stay of execution, or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding is to be invalidated, except so far as the Court appealed from may direct (*h*). Ord. LVIII. r. 16.

Where a party taking the preliminary objection that an appeal was out of time did so without giving notice, the appeal was dismissed without costs (*i*). Notice of preliminary objections should be given.

But the absence of any statement of the grounds of appeal in the notice of appeal is not a reason for dismissing the appeal on a preliminary objection, such statement not being a condition precedent to the hearing of appeals, although the regulation of 18th February, 1890, already set out, should be followed (*ii*).

Application for leave to appeal from the decision of a Divisional Court should be made immediately after it has been given (*k*). Leave to appeal from Divisional Court.

An appeal lies to the Court of Appeal, and without leave, from the decision of the High Court upon a special case for its opinion stated by a County Court sitting in bankruptcy under sect. 97 (3) of the Bankruptcy Act, 1883 (*l*). Special case.

(*e*) R. S. C., Ord. LVIII. r. 11.
(*f*) *Ibid.* r. 12. (*g*) *Ibid.* r. 13. (*h*) *Ibid.* r. 16.
(*i*) ——*In re Blinkhorn, Ex parte Blease* (1884), 1 Mor. 280; 14 Q. B. D. 123; 33 W. R. 432.
In re Speight, Ex parte Brooke (1884), 1 Mor. 280; 13 Q. B. D. 42.
(*ii*) *Re Smith, Ex parte Denbigh* (1892), 9 T. L. R. 72. See the Regulation on p. 61, *ante*.
(*k*) *In re Walker, Ex parte Nickoll* (1884), 1 Mor. 249; 47 Vict. c. 9, s. 2.
(*l*) *In re Moon, Ex parte Dawes* (1886), 17 Q. B. D. 275; 55 L. T. 114; 34 W. R. 752; 3 Mor. 105.

CHAPTER XIV.

APPEALS IN ADMIRALTY.

County Courts Admiralty Jurisdiction Act, 1868.

An appeal was given by the County Courts Admiralty Jurisdiction Act, 1868 (*a*), to the High Court of Admiralty (*b*) in an Admiralty cause :—

Sect. 26.

1. From a final decree or order of a County Court;
2. (By permission of the County Court judge) from any interlocutory decree or order therein;
3. On security for costs being first given (*d*);
4. And subject to such other provisions as general orders shall direct (*e*).

Sect. 27.

The time for appealing was fixed by the Act cited as within ten days from the date of the decree or order appealed from, unless an extension of time were granted by a judge of the High Court of Admiralty on sufficient cause being shown (*f*);

Sect. 28.

but no appeal was to be allowed if before the decree or order was made in the County Court the parties agreed, by memorandum signed by them, their attorneys, or agents, that the decree should be final (*g*).

The Act also prohibited appeals from being brought from a decree or order of a County Court, except by express permission of a judge of the High Court of Admiralty (*h*), but this section has since been repealed (*i*).

Sect. 30.

On an appeal under the Act of 1868, an unsuccessful appellant is to pay the costs of the appeal, "unless the appellate Court shall otherwise direct," thus upholding the

(*a*) 31 & 32 Vict. c. 71, s. 26.
(*b*) But now to a Divisional Court of the High Court of Justice.
(*d*) But see *The Delano*, (1895) P. 40; 72 L. T. 125; 64 L. J. P. 8; 43 W. R. 65.
(*e*) 31 & 32 Vict. c. 71, s. 26.
(*f*) *Ibid.* s. 27.
(*g*) *Ibid.* s. 28.
(*h*) *Ibid.* s. 29.
(*i*) By 38 & 39 Vict. c. 50, s. 12.

same judicial discretion in the matter of costs as generally exists (*j*).

And no appeal was to be allowed unless the amount decreed or ordered to be due exceeded the sum of 50*l.* (*k*); from which it seems that the amount actually claimed in the first instance is immaterial, the test being thus the reverse of that applicable in general to County Court appeals, in which the amount originally claimed, and not the amount given in the judgment, is the material figure. Sect. 31.

But the wording of the section, whilst preventing a defendant from appealing unless the decree or order is over 50*l.*, does not prevent a plaintiff who has recovered nothing from appealing (*l*).

Rather inconsistently, as it seems, with the rule of interpretation already referred to, it has been held, that inasmuch as the language of the appeal section of the later County Courts Act, 1888, is general in its terms, it will include an appeal from the final judgment of a County Court in an Admiralty action, in spite of the thirty-first section of the County Courts Admiralty Jurisdiction Act, 1868 (*m*). And the earlier Act is impliedly repealed by the Act of 1888 to the extent of allowing the party aggrieved by the decision of a County Court judge on a point of law to appeal though the amount is under 50*l.*, and though no security for costs has first been given. But in respect of a question of fact, the special provisions of the Act of 1868 are unaffected (*n*). Effect of County Courts Act, 1888.

If, on any appeal under the Act in question, it appears expedient to the judge of the High Court of Admiralty that any sale decreed or ordered to be made of the vessel or property to which the cause relates should be conducted in the High Court of Admiralty instead of in the County Court from which the appeal is brought, he may direct the transfer of the proceedings for sale, with or without the transfer of the subsequent proceedings in the cause, to the High Court of Admiralty, which Court shall have jurisdiction and all powers and authorities relating thereto accordingly (*o*). Sect. 32.

(*j*) 31 & 32 Vict. c. 71, s. 30. See Chapter on Costs, p. 73.
(*k*) *Ibid.* s. 31.
(*l*) *The Falcon* (1878), 3 P. D. 100; 47 L. J. Adm. 56; 17 W. R. 899; 26 W. R. 696; 38 L. T. 294.
(*m*) *The Eden*, (1892) P. 67; 61 L. J. P. 68; 66 L. T. 387; 40 W. R. 415; 7 Asp. 174.
(*n*)——*The Delano*, (1895) P. 40; 72 L. T. 125; 64 L. J. P. 8; 43 W. R. 65.
The Alert (1895), 72 L. T. 124.
Cousins v. *Lombard Bank* (1876), 1 Ex. D. 404; 45 L. J. C. P. 573; 35 L. T. 484; 25 W. R. 116.
(*o*) 31 & 32 Vict. c. 71, s. 32.

Sect. 44.

The Act was also to be read as one with so much of the County Courts Act, 1846, and the Acts amending or extending the same, as was (at the time of its passing in 1868) in force (*p*).

The express proviso of sect. 26 of the Act of 1868, limiting the right of appeal in interlocutory decrees or orders to those cases in which leave has been given by the County Court judge, is apparently not affected by the general terms of the appeal section of the County Courts Act, 1888, and so the right of appeal given by the earlier Act is not enlarged by the later one (*q*). On this ground the judgment of Butt, J., is intelligible, but the judgment contains a curious doubt as to whether the County Courts Act of 1888 really gave an appeal in interlocutory matters in general, and cites *Carr* v. *Stringer* (*r*). Such a doubt must be finally dispelled by *Gibson* v. *Kilner* (*s*), which interprets the Act differently, and leaves the decisions in *Carr* v. *Stringer* (*t*) and *Jonas* v. *Long* (*u*) no longer applicable.

The judge's note.

The judge's note has always been more freely dispensed with in appeals in Admiralty than in appeals in the general jurisdiction of the Courts, and the Act (*x*) is silent as to the procedure to be followed.

In 1879, an appeal came before Sir R. Phillimore with no shorthand writer's notes of evidence, and no notes taken by the judge of the County Court available for the purpose of appeal, and the appeal was ordered to be heard on *viva voce* evidence; the parties being at liberty to procure the judge's notes if they could, and if, on their being procured, they were found to be of use for the purposes of appeal, the respondents could apply to the Court again to make such use of the notes as they could, or to set aside the order (*y*).

More recently, where no notes of evidence had been taken at the County Court, either by the judge or by a shorthand writer, the defendants gave notice of appeal, and moved before the Divisional Court in the Admiralty Division, consisting of the President and Mr. Justice Barnes, and obtained an order, under Ord. LXIX. r. 8 of the Rules of the Supreme Court, that upon the hearing of the appeal the witnesses

(*p*) 31 & 32 Vict. c. 71, s. 34.
(*q*) *The Cashmere* (1890), 15 P. D. 121; 59 L. J. P. 57; 62 L. T. 814; 38 W. R. 623.
(*r*) (1858), E. B. & E. 123.
(*s*) (1893), 69 L. T. 310.
(*t*) (1858), E. B. & E. 123.
(*u*) (1888), 20 Q. B. D. 564; 57 L. J. Q. B. D. 298; 58 L. T. 787; 36 W. R. 315; 52 J. P. 468.
(*x*) 31 & 32 Vict. c. 71.
(*y*) *The Confidence* (1879), 40 L. T. 201.

called and examined at the trial of the action in the Court below, both of the plaintiffs' and defendants', might be examined *viva voce* before the Divisional Court as to what they had said in the Court below; upon the ground that the learned judge in the Court below had taken no note of the evidence, and that otherwise the appellants would be deprived of their right to appeal. Against this order the plaintiffs appealed; but the order of the Divisional Court was upheld, Lord Justice Lindley saying that the Court had power to make such an order, but that the evidence to be reproduced should be confined to what was given before the County Court, as the defendants were not entitled, under the rule, to have a new trial. There might be some difficulty in preventing fresh evidence being given, and the appeal so becoming practically a new trial; but the Divisional Court must be trusted to deal with that as they thought best. Lord Justice Kay concurred, as no evidence was obtainable upon which to hear the appeal except by calling the witnesses and asking them what evidence they gave at the trial. It was within the very letter of the rule for the Divisional Court to call the witnesses before them and ask them to repeat all that they had said. Lord Justice A. L. Smith concurred (*z*).

Cross appeals.

The Divisional Court in Admiralty has no jurisdiction to hear a cross appeal the subject-matter of which it has no jurisdiction to hear as an original appeal, the Court having only an appellate jurisdiction (*a*).

Fresh evidence.

An application to allow fresh evidence to be adduced at the hearing of an Admiralty appeal from an inferior Court may be made to a single judge of the Admiralty Division (*b*).

To which Court appeals in Admiralty lie.

Before the Judicature Act, appeals from County Courts possessing Admiralty jurisdiction, including the City of London Court, lay to the Court of Admiralty (*c*); but this appellate jurisdiction was by the Judicature Act, 1873, transferred to, and vested in, the High Court of Justice. Since then Admiralty appeals have been heard by Divisional Courts of the Probate, Divorce and Admiralty Division (*d*).

(*z*) *The Crescent* (1893), 1 R. 613; 68 L. T. 556; 62 L. J. P. 63; 41 W. R. 533; 7 Asp. M. C. 297.
(*a*) *The Alne Holme*, (1893) P. 173; 1 R. 607; 62 L. J. P. 51; 68 L. T. 862; 41 W. R. 572.
(*b*) *The Eclipse* (1889), 14 P. D. 71; 60 L. T. 899; Judicature Act, 1873, s. 52; Ord. LIX. r. 17.
(*c*) 31 & 32 Vict. c. 71, s. 26.
(*d*) See Ord. LIX. r. 4, which is substantially the same as the former Ord. LVIII. r. 19, of 1875.

Appeals from Liverpool Court of Passage.

Appeals from the Liverpool Court of Passage now lie direct to the Court of Appeal (*e*).

Procedure on appeal.

It was decided, under the County Courts Act, 1875 (which gave an appeal by motion instead of by special case), that Admiralty appeals from County Courts might still be brought under the County Courts Admiralty Jurisdiction Act, 1868, —namely, by lodging the instrument of appeal in the principal registry under the provisions of sect. 27—as well as under the County Courts Act, 1875 (*f*). In the view of the President and Butt, J., the Act of 1875 gave an additional mode of appeal, without expressly or impliedly repealing that which already existed.

It is supposed that, although the County Courts Act, 1888, repeals its predecessor of 1875, yet, since it re-enacts that appeals shall be by motion, and without direct reference to the Act of 1868, the express provisions of the latter are not repealed.

By notice of motion.

If the appeal is brought by notice of motion, the latter must, by Ord. LIX. r. 12, be served, and the appeal entered, within twenty-one days from the date of the judgment, order or finding complained of, the Court having power, however, to extend that time (*g*).

By instrument of appeal.

If by instrument of appeal, the latter, together with security, must be lodged within ten days after the finding to be appealed against, the security being given in the County Court (*h*), and the instrument of appeal being lodged in the High Court to which the appeal is brought; the High Court also having power to extend the time on good cause being shown (*i*).

The instrument of appeal, though not defined in the Act, may, it seems, consist of a short statement of the cause, the finding complained of, and a declaration that an appeal will be made (*k*).

Enlargement of time.

Application for enlargement of time should be made to the Divisional Court, or, if not sitting, to a judge of the Admiralty Division.

(*e*) Liverpool Court of Passage Act, 1893; *Anderson* v. *Dean*, (1894) 2 Q. B. 222; 9 R. 418; 63 L. J. Q. B. 668; 70 L. T. 830; 42 W. R. 472.

(*f*) *The Humber* (1883), 9 P. D. 12; 32 W. R. 664; 53 L. J. P. 7; 49 L. T. 604; 5 Asp. M. C. 181.

(*g*) —— *Tenant* v. *Rawlings* (1879), 4 C. P. D. 134; 27 W. R. 682. *The Humber* (1883), *ubi sup.*

(*h*) *The Forest Queen* (1870), 40 L. J. Adm. 17; L. R. 3 Adm. 299; 23 L. T. 544; 19 W. R. 167.

(*i*) 31 & 32 Vict. c. 71, s. 27.

(*k*) *The Dowse* (1870), L. R. 3 Adm. 135; 39 L. J. Adm. 46; 22 L. T. 627; 18 W. R. 1008.

If the judgment appealed against ordered the vessel to be discharged, the appellant may, after entering his appeal, obtain a new warrant of arrest from the Admiralty Division of the High Court (*l*). New warrant of arrest after discharge.

Where an Admiralty action has been heard in a County Court, with the assistance of nautical assessors, elder brethren of the Trinity House will be summoned to assist on the hearing of an appeal by the High Court— Assessors.

(1) If either party require it;

(2) And the High Court is of opinion that the assistance of the elder brethren is necessary or desirable (*m*).

This was never done until the passing of the County Courts Act, 1875, which contained a similar provision (*n*).

Cases arising within the jurisdiction of the Cinque Ports (*o*) may be transferred by the County Court, and appeals made to the Court of Admiralty of the Cinque Ports in lieu of the High Court, appeals in which cases should be lodged in the registry of the Cinque Ports; the same discretion being vested in the judge, official, and commissary of the Cinque Ports as is by the Act of 1868 vested in the judge of the High Court (*p*). Transfer from Cinque Ports.

On the hearing of an appeal in Admiralty, two counsel are heard on each side, and counsel for the appellant in reply. Hearing.

The right of appeal from an order of a Divisional Court varying the judgment of a County Court in an Admiralty cause was held, in the year 1888, to be governed by the County Courts Act, 1875, and an appeal might therefore be brought, without leave, from such an order to the Court of Appeal (*q*). Appeals from Divisional Courts.

The same result was arrived at in the case of *The Dart* (*r*), which was decided under the County Courts Acts of 1875 and 1888.

By sect. 10 of the County Courts Act, 1875, no leave was necessary to appeal to Her Majesty in Council where the High Court of Admiralty altered the judgment of the County Court. By sect. 188 of the County Courts Act, 1888, the whole of the County Courts Act, 1875, is repealed; but, by sect. 5, "this repeal shall not revive any enactment . . . . not in force at the commencement of the Act."

(*l*) *The Miriam* (1874), 43 L. J. Adm. 35; 30 L. T. 537.
(*m*) County Courts Act, 1888, s. 125.
(*n*) See Williams & Bruce, 2nd ed., p. 528.
(*o*) As defined in 1 & 2 Geo. 4, c. 76, s. 18.
(*p*) 31 & 32 Vict. c. 71, s. 33.
(*q*) *The Lydia* (1888), 14 P. D. 1; 58 L. J. P. 37; 39 L. T. 843; 37 W. R. 161.
(*r*) (1893) P. 33; 1 R. 572; 62 L. J. P. 32; 69 L. T. 251; 41 W. R. 153.

So, where a Divisional Court sitting in Admiralty reversed the judgment of a County Court, and refused leave to appeal, it was held (Lord Esher, M.R., Lopes and Kay, L.JJ.) that an appeal could be heard without leave, for so much of sect. 45 of the Judicature Act, 1873, as was inconsistent with sect. 10 of the County Courts Act, 1875, was impliedly repealed by the latter Act, and therefore was "not in force" at the time of the repeal of the County Courts Act, 1875, by the County Courts Act, 1888 (*s*).

(*s*) *The Dart*, (1892) C. A., *ubi sup.*

CHAPTER XV.

COSTS OF APPEALS.

Successful party is usually awarded costs.

Cases considered.

THE rule has long been that, whilst it is entirely within the discretion of the Court to make such order as it deems proper, the successful party will, as a rule, be entitled to have costs (*a*). Willes, J., in the case first cited, delivered the considered judgment of the Court, since it had previously been held otherwise where the appeal was on the ground of misdirection (*b*). The cases reviewed in the judgment show that the rule adopted by the Court was almost universally followed (*c*); and if otherwise, indeed, the party's success might be *damnosa hæreditas* (*d*). In one case, in which it had been held otherwise, there were special circumstances (*e*).

The rule is the same in the Privy Council (*f*).

And so, in an older case (*g*), whilst the general rule was recognised, it was held, where the judge refused to nonsuit, but gave plaintiff leave to move to set the verdict aside and have a nonsuit entered, but plaintiff did not move, but appealed, that he was entitled to his costs of appeal. For a plaintiff in the County Court has a right to be nonsuited at any time before judgment or verdict.

To bring a case within the rule laid down in *Schroder* v.

(*a*)——*Schroder* v. *Ward* (1863), 13 C. B. N. S. 410; 32 L. J. C. P. 150; 9 Jur. N. S. 1056; 7 L. T. 825; 11 W. R. 427.
Foster v. *Smith* (1856), 18 C. B. 156.
(*b*) *Gee* v. *Lancashire and Yorkshire Railway* (1861), 6 H. & N. 211; 30 L. J. Ex. 11; 6 Jur. N. S. 1118; 3 L. T. 328; 9 W. R. 103.
(*c*)——See *Gibbon* v. *Gibbon* (1853), 13 C. B. 205; 22 L. J. C. P. 135, n.; 17 Jur. 416.
Liederman v. *Schultz* (1853), 14 C. B. 38; 2 C. L. R. 87; 18 Jur. 44, n.
Foster v. *Smith* (1856), 18 C. B. 156.
(*d*)——*Robinson* v. *Lord Vernon* (1859), 7 C. B. N. S. 231; 29 L. J. C. P. 135; 6 Jur. N. S. 610; 1 L. T. 67.
Weaver v. *Joule* (1857), 3 C. B. N. S. 309.
Gray v. *Bompas* (1862), 11 C. B. N. S. 520.
(*e*) *L. & N. W. Railway* v. *Grace* (1857), 2 C. B. N. S. 555.
(*f*) *Valentine* v. *Cleugh* (1854), 8 Moore's P. C. Cas. 167.
(*g*) *Outhwaite* v. *Hudson* (1852), 7 Ex. 380; 21 L. J. Ex. 151; 16 Jur. 430.

Ward (*h*), costs must be applied for at the time it is disposed of, and not, for example, three days after (*i*).

So, it is the substantial result that costs will follow, except where otherwise provided by sect. 67 of the Judicature Act, 1873, or by Ord. LV., or by any such future provision (*k*). And in *Conybeare* v. *Farries* (*l*), the view was taken that costs ought not to be refused merely on the ground that the appeal has been rendered necessary by the misdirection of the judge (*m*).

But other cases lay down that the Court ought to exercise its full discretion (*n*), the Court expressly holding, in *Richardson* v. *North Eastern Railway* (*o*), that the rule laid down in *Schroder* v. *Ward* (*p*) will not necessarily be followed, but the Court will exercise its discretion.

So *Garnett* v. *Bradley* (*q*) decided that the effect of Ord. LV., which provides that costs shall be in the discretion of the Court, together with sect. 33 of the Judicature Act, 1875, was to repeal the 21 Jac. I. c. 116, s. 6, and 3 & 4 Vict. c. 24, as inconsistent with the general discretion given by the Order.

But where an Act is silent as to costs, the Court has an inherent jurisdiction to order a person who wrongly puts it in motion to pay the costs of his application (*r*).

General rule in equity.

In equity, the rule is that the Court will not give costs of an appeal to a successful appellant except under special circumstances, since the Court should not make the party who was unsuccessful below pay for the mistake of the judge (*s*).

(*h*) (1863), 32 L. J. C. P. 150; 13 C. B. N. S. 410; 9 Jur. N. S. 1056; 7 L. T. 825; 11 W. R. 427.

(*i*) *Taylor* v. *G. N. Railway* (1866), L. R. 1 C. P. 430; 35 L. J. 210; 12 Jur. N. S. 372.

(*k*) —— *Parsons* v. *Tinling* (1877), 2 C. P. D. 119; 35 L. T. 851; 46 L. J. C. P. 230; 25 W. R. 255. See also *Garnett* v. *Bradley* (1878), 3 App. Cas. 944; 48 L. J. Ex. 186; 39 L. T. 261; 26 W. R. 698.

(*l*) (1869), L. R. 5 Ex. 16; 39 L. J. Ex. 26; 21 L. T. 497.

(*m*) Thus, again, not following *Gee* v. *Lancashire & Yorkshire Railway*, *ubi sup.*

(*n*) *Mountnoy* v. *Collier* (1853), 17 Jur. 503; 1 E. & B. 100; 22 L. J. Q. B. 126, n.

(*o*) (1872), L. R. 7 C. P. 75; 41 L. J. C. P. 60; 26 L. T. 131; 20 W. R. 461.

(*p*) (1863), 32 L. J. C. P. 150; 13 C. B. N. S. 410; 9 Jur. N. S. 1056; 7 L. T. 825; 11 W. R. 427.

(*q*) (1878), 3 App. Cas. 944; 48 L. J. Q. B. 186; 39 L. T. 261; 26 W. R. 698.

(*r*) *Ex parte Pringle* (1889), 40 Ch. D. 288; 58 L. J. Ch. 815; 60 L. T. 796.

(*s*) —— *Denny* v. *Hancock* (1870), L. R. 6 Ch. App. 138; 40 L. J. Ch. 193. *Fallows* v. *Slatter* (1869), 20 L. T. 104, 513; 38 L. J. Ch. 609.

But Malins, V.-C., while agreeing with that rule, as laid down in *Denny* v. *Hancock*, was of opinion that the rule did not apply to appeals from County Courts, in the proceedings in which the subject-matter must necessarily be small, and it would frequently amount to a denial of justice to a party succeeding if he had to pay the costs of his appeal. It was of the greatest importance that the party succeeding on the appeal should be completely indemnified by getting his costs (*t*). Not applicable to County Court appeals.

Different opinions have been expressed respecting the power of the superior Courts over the costs in the Court below. On the one hand (*u*), that the superior Court has power over them; and on the other (*x*), that it has not. Willes, J. (Keating, Montague and Smith, JJ., concurring), thought that, in cases of appeal at least, the costs of the Court below must have been intended to be dealt with as accessory to the judgment appealed from, and that on a judgment being reversed, the order for payment of costs should also fall (*y*). But a Divisional Court refused to interfere with the discretion of a County Court judge, vested in him by the County Courts Act of 1867 (*z*), where he had given leave to appeal subject to the payment of costs in any event (*a*). Power of superior Courts over costs in Courts below.

This practice of imposing costs in any event, when giving a party leave to appeal, met with the disapproval of Kelly, C.B., and Hawkins, J., in a later case (*b*).

In remitted and transferred actions, the scales of costs apply respectively to such portions of the actions as took place in either Court (*c*), unless there has been some impropriety in commencing the suit in the High Court (*d*). Remitted actions.

(*t*) *Ashby* v. *Sedgwick* (1873), L. R. 15 Eq. 245; 42 L. J. Ch. 355; 28 L. T. 185; 21 W. R. 455.
(*u*) As in *Whitehead* v. *Procter* (1858), 3 H. & N. 532.
(*x*) As in *Churchward* v. *Coleman* (1866), L. R. 2 Q. B. 18; 36 L. J. Q. B. 57.
(*y*) *Gage* v. *Collins* (1867), L. R. 2 C. P. 381; 36 L. J. C. P. 144; 15 W. R. 568.
(*z*) 30 & 31 Vict. c. 142, s. 13.
(*a*) *Goodes* v. *Cluff* (1884), 13 Q. B. D. 694.
(*b*) *Ashenden* v. *L. B. & S. C. Railway* (1880), 42 L. T. 586.
(*c*) —— See (*e.g.*) *Moody* v. *Steward* (1870), L. R. 6 Ex. 35; 40 L. J. Ex. 25; 23 L. T. 465; 19 W. R. 161.
Wheatcroft v. *Foster* (1858), E. B. & E. 737; 27 L. J. Q. B. 277; 4 Jur. N. S. 896.
(*d*) —— *Carpmael* v. *Carvell* (1870), 18 W. R. 513.
Ward v. *Wyld* (1877), 5 Ch. D. 779; 25 W. R. 866; 37 L. T. 68.
Wilson v. *Statham*, (1891) 2 Q. B. 261; 60 L. J. Q. B. 725; 39 W. R. 686.

As to security.

Security for the costs of an appeal may be directed to be given (*e*), and is not now required as a matter of course (*f*).

But an appeal does not operate as a stay of proceedings unless it is so ordered by the Court below, or unless within ten days after the decision a deposit is made, or security given to the satisfaction of the inferior Court for a sum fixed by it not exceeding the amount of the money or the value of the property affected by the judgment, order or finding appealed from (*g*).

The High Court is not prevented by the rule just cited from ordering security to be given (*h*), and the application should be made under C. O. R. 255, which has already been referred to.

The Divisional Court will not, however, as a rule, require security for the costs of an appeal from a County Court where leave to appeal has been unconditionally given by the judge of the County Court (*i*).

And where an appellant has paid money into Court as security for the costs of an appeal, and succeeds, the Court, in addition to allowing him the costs of the appeal, will order the money to be paid out to him (*k*).

And where an infant was appealing against a County Court judgment through his next friend, who was insolvent, the Court ordered the latter to give security for costs, having power to do so by Ord. LIX. r. 17, which applies Ord. LVIII. r. 15, to County Court appeals (*l*).

It was held, under the old Act, that security for costs should be given within the time limited, and will not be accepted after its expiration (*m*). But an appeal was heard where the delay was not caused by the appellant (*n*).

The reviewal of taxation of costs is in the discretion of the judge, and his refusal to review was held not to be a "refusing to do an act relating to the duties of his office" within

(*e*) R. S. C., Ord. LVIII. r. 15.
(*f*) *Wilson* v. *Smith* (1876), 2 Ch. D. 67; 45 L. J. Ch. 292; 34 L. T. 471; 24 W. R. 421.
(*g*) R. S. C., Ord. LIX. r. 14.
(*h*) *Shaw* v. *Girvin* (1886), unreported: cited in Short & Mellor's "Crown Office Practice," p. 493.
(*i*) Per Cave and Smith, JJ., *Ex parte Apothecaries' Society* (1890), 38 W. R. 478.
(*k*) *Kelly* v. *Webster* (1852), 16 Jur. 838.
(*l*) *Swain* v. *Follows* (1887), 18 Q. B. D. 585; 56 L. J. Q. B. 310; 56 L. T. 335; 35 W. R. 408.
(*m*) *Blenkairne* v. *Statter* (1874), 31 L. T. 413.
(*n*) *Waterton* v. *Baker* (1868), L. R. 3 Q. B. 173; 17 L. T. 494.

the meaning of 19 & 20 Vict. c. 108, s. 43 (*o*). But an appeal was heard, in an administration suit under the County Courts Equitable Jurisdiction Act (*p*), from the order of a County Court judge as to payment of costs, and his decision reversed (*q*).

(*o*) *Clifton* v. *Furley* (1862), 31 L. J. Ex. 170; 7 H. & N. 783; 10 W. R. 358.
(*p*) 28 & 29 Vict. c. 99.
(*q*) *Cooper* v. *Busbridge* (1867), 16 L. T. 5.

CHAPTER XVI.

MANDAMUS.

1. The prerogative writ.

Description of writ.

Origin.

The writ of mandamus is in form a command issuing in the name of the Sovereign from the Sovereign's Court, and directed to any officer, person, artificial person, or corporation or inferior Court, within the Sovereign's dominions, requiring performance of some act or duty therein specified, the execution of which such Court has previously determined to be consonant to right and justice (*a*). It was in its origin a mere missive from the Sovereign commanding performance of a particular act or duty. Then it came to be used principally to enforce restitution to public offices (*b*); and at length, owing to the extent to which it was employed, and to its highly remedial nature, it obtained the sanction of an original writ, being issued in all cases where there was a legal right to justice for which the law had not provided any specific legal remedy (*c*), or where there was oppression of the subject or other misgovernance (*d*).

The modern writ.

High prerogative writ.

The modern writ of mandamus is a high prerogative writ of a most extensively remedial nature (*e*), and not a writ of

(*a*) 3 Bl. Com. (21st ed.) 109: Tapping on Mandamus, p. 5. "It is a prerogative writ, and it shall be granted to ampliate justice, and to preserve a right where there is no specific remedy, where no assize will lie."—Per Wilmot, J. (1762), *R.* v. *Barker*, 3 Burr. 1265; 1 W. Bl. 351. It has always been a remedial and beneficial writ to those who have been oppressed, especially where the party aggrieved could not maintain an assize. Such writs were called by Coke *brevia mandatoria et remedialia*. (*Calvin's Case* (1608), 7 Co. 20; Vaugh. 401.)

(*b*) Ray. 431; Com. Dig. Man. (A).

(*c*) *R.* v. *Dublin* (*Dean of*) (8 Geo. 1), 8 Mod. 29. That its origin is most ancient is shown by the fact that its use can be traced back with certainty to the time of Edward III. (*Askew's Case* (1768), 4 Burr. 2186.) And it was possibly used before the time of Edward I. (*Reg.* v. *Cambridge* (10 Geo. 1), Fort. 202.)

(*d*) *Bagg's Case* (13 Jac. 1), 6 Co. 182.

(*e*) *Reg.* v. *Bosworth* (12 Geo. 2), Stra. 1112.

right (*f*), or, perhaps, as Martin, B., chose to put it, it is a writ of right, but not of course (*g*), it being supposed to issue from a Court in which the Sovereign is in theory personally present, and issuable as a grace and favour granted according to discretion upon probable cause shown. It can be granted only by the Queen's Bench Division (*h*), and the applicant for it should not be in fault (*i*).

Only granted by Q.B.D.

The Court may refuse to grant the writ, not only upon the merits, but upon some delay or other matter personal to the party applying for it; in this the Court exercises a discretion which cannot be questioned. So, in cases where the right in respect of which a rule for a mandamus has been granted upon showing cause appears to be doubtful, the Court frequently grants a mandamus in order that the right may be tried upon the return; this is also a matter of discretion.

But where the judges grant a peremptory mandamus, which is a determination of a right, and not a mere dealing with the writ, they decide according to the merits of the case, and not upon their own discretion, and their judgment must be subject to review, as in every other decision in actions before them (*j*).

Circumstances in which granted.

For the Court to interpose by granting this writ—

(1) The applicant must have a specific legal right, the fulfilment of which is demandable from the person to whom the writ is to be directed (*k*). 1. Legal right.

(2) There should, ordinarily, be no specific legal remedy whereby the fulfilment of the specific right may be compelled (*l*). 2. No other remedy.

(*f*) *R.* v. *G. W. Railway* (1893), 62 L. J. Q. B. 572; 9 R. 127; 69 L. T. 572.

(*g*) *Jackson* v. *Beaumont* (1855), 11 Ex. 300; 24 L. J. 301.

(*h*) *Glossop* v. *Heston, &c. Board* (1879), 12 Ch. D. 102; 47 L. J. Ch. 536; 26 W. R. 433.

(*i*) *R.* v. *G. W. Railway* (1893), 62 L. J. Q. B. 572, at p. 583.

(*j*) Per Lord Chelmsford, in *R.* v. *Churchwardens of All Saints, Wigan* (1876), 1 App. Cas. 611; 35 L. T. 381; 25 W. R. 128.

(*k*)——*R.* v. *Archbishop of Canterbury* (1807), 8 East, 213.
R. v. *Company of Surgeons* (1759), 2 Burr. 892,
where a mandamus was applied for to enforce a custom.
R. v. *Bishop of London* (1786), 1 T. R. 331,
where immemorial custom was held to be so enforceable.
Simpson v. *Scottish Insurance Co.* (1863), 1 H. & M. 618,
where Page-Wood, V.-C., said it was settled that where an entirely new right is given by statute the remedy is by mandamus.
Peat's Case (3 Anne), 6 Mod. 228.

(*l*)——*Reg.* v. *Lambourn Valley Rail. Co.* (1889), 22 Q. B. D. 463; 58 L. J. Q. B. 136; 60 L. T. 54; 53 J. P. 248.
R. v. *Incorporated Law Society* (1895), 11 T. L. R. 557.
R. v. *Barker* (1762), 3 Burr. 1265; 1 W. Bl. 351.
R. v. *Bank of England* (1780), 2 Doug. 524.
R. v. *Archbishop of Canterbury* (1807), 8 East, 213.
R. v. *Commissioners of Inland Revenue* (1884), 12 Q. B. D. 464.

3. To insure justice.

(3) Its issue must be required to prevent a failure of justice, and upon the assumption that that which ought to have been done has not been done (*m*); thus giving effect to, if not actually springing from, the clause in Magna Charta which undertakes "*nulli negabimus aut differemus justitiam vel rectum*" (*n*).

4. Court must have the power.

(4) The jurisdiction of the Court to command the execution of the particular act or duty demanded must be clear, as well as its power to enforce it (*o*).

5. Duty must be a public one.

(5) The act or duty required to be performed must be a public one, and not a mere private duty between individuals—as the payment of money secured by bond, &c.—the enforcement of which may be effected by other legal means (*q*).

R. v. *Registrar of Joint Stock Companies* (1888), 21 Q. B. D. 131.
In re Barlow (1861), 30 L. J. Q. B. 271.
And see *R.* v. *L. & N. W. Railway*, (1894) 2 Q. B. 513,
where Wright, J., explaining *R.* v. *Lambourn Valley Rail. Co.* (*supra*), thought it would be unduly narrowing the powers of the Court to hold that the prerogative writ will not be granted in *any* case if it be shown that a mandamus could have been granted for the same purpose in an action.
Ex parte Robins (1839), 7 Dowl. 566,
where the Court refused a mandamus to a company on breach of contract to carry applicant's goods.

Mandamus will not be granted where there is a remedy by way of appeal.
R. v. *Weobly* (19 Geo. 2), 2 Str. 1259.

Whether there may be some cases in which mandamus may issue when another, though more tedious, mode of redress exists, *quære*. (See 3 Bl. Com., 21st ed. 109.) It was recently held in the affirmative:—
R. v. *Justices of Bradford* (1896), L. T. April 11th, p. 560.

But Lord Mansfield always refused it when there was another remedy.
R. v. *Bishop of Chester* (1786), 1 T. R. 396.

And it will be refused if clearly unnecessary.
R. v. *Pitt* (1839), 10 A. & E. 272.
R. v. *Bishop of Chester* (1786), 1 T. R. 396.
R. v. *Fowey* (1824), 2 B. & C. 584.

(*m*) *R.* v. *Gloucester* (1857), 7 El. & Bl. 805; 27 L. J. M. C. 15; 3 Jur. N. S. 980.

(*n*) *Reg.* v. *Heathcote* (10 Anne), 10 Mod. 53.

(*o*)——*R.* v. *Bishop of London* (1786), 1 T. R. 331.
And it will not be granted if, when granted, it can only be nugatory.

Jurisdiction cannot be given by consent.
R. v. *Treasury* (1851), 16 Q. B. 357.

The writ cannot be directed against the Crown, or against persons acting as servants of the Crown, and who are consequently not amenable to the Court of Queen's Bench in the exercise of its prerogative jurisdiction.
R. v. *Lords Commissioners of the Treasury* (1872), L. R. 7 Q. B. 387.

Per Cockburn, C. J., who considered that the previous case of *R.* v. *Lords of the Treasury* (1835), 4 A. & E. 286, as of very doubtful authority.

(*q*)——*R.* v. *Bank of England* (1819), 2 B. & A. 622,
where Bayley, J., refused the writ to compel the corporation to produce its books of account to enable its position to be considered with a view to a dividend.
R. v. *Clear* (1825), 4 B. & C. 899.
R. v. *Bishop of Chester* (1786), 1 T. R. 396.
R. v. *Payn* (1837), 1 N. & P. 527.

(6) There must have been a refusal to perform the duty (*r*); and it is not enough that such refusal should be feared, for the writ will not be granted in anticipation (*s*). 6. Prior refusal.

(7) The duty required must be a positive one to do some act in execution of law (*t*). 7. Positive duty.

(8) If for the exercise of judicial functions, there must have been a refusal to exercise such functions: not merely an exercise in such a manner, or with such results, as, in the opinion of the superior Court, are mistaken or erroneous (*u*). 8. Judicial functions, refusal to exercise.

(*r*) *Glossop* v. *Heston, &c. Board* (1879), 12 Ch. D. 102, at p. 115.

(*s*) *Blackborough* v. *Davis* (1701), 1 P. Wms. 41.

(*t*) Not merely to refrain from acting, as, for example, to refrain from preventing a dissenting preacher from preaching, which would rather be the subject of a writ *de non molestando*.

Peat's Case (3 Queen Anne), 6 Mod. 228.

Mandamus was granted to the clerk of the peace of a borough to permit ratepayers to inspect the rate-books.

R. v. *Leicester, &c.* (1826), 7 Dow. & Ry. 708.

By the Summary Jurisdiction Act, 1879, s. 33, any person aggrieved who desires to question a conviction, &c. of a court of summary jurisdiction may apply to it to state a case, and on refusal to the High Court for an order requiring it to state one.

And under the old procedure it was held that a County Court judge was bound to affix his signature to a special case prepared by the parties for appeal.

Furber v. *Sturmy* (1858), 4 Jur. 956; 3 H. & N. 521; 27 L. J. Ex. 453.

Irving v. *Askew* (1870), L. R. 5 Q. B. 209; 39 L. J. Q. B. 118; 18 W. R. 467.

Mandamus is the proper remedy for enforcing the taking up of an award under the Lands Clauses Act.

R. v. *L. & N. W. Railway*, (1894) 2 Q. B. 512.

(*u*)——*R.* v. *Dep. of Leicester* (1826), 7 Dow. & Ry. 708.

"The Court will by mandamus make an inferior Court exercise its jurisdiction when it has refused to do so on a mistaken view of the law; but will not make it review its decision on facts when it has heard and decided." Per Lord Campbell, C. J.

So again, per Lord Hardwicke, C. J.:—"If the (inferior tribunal) acts *judicially* a mandamus lies, not to compel it (*e.g*) to grant a licence, but only to determine the one way or the other. If, however, the (inferior Court) acts *ministerially*, and it appears that the person applying for the mandamus is (*e.g.*) qualified for the office he prays to be admitted to, then a mandamus goes requiring his admission."

R. v. *Bishop of Lichfield* (7 Geo. 2), 7 Mod. 217.

And per Lord Ellenborough, C. J.:—"The superior Court can only compel the inferior Court (when acting *judicially*) to inquire; and cannot divest it of that function which the legislature has for wise purposes vested in it. . . . All that the Court can do is to see that that function is well exercised by (the inferior Court) in which it was so vested. But it must duly and impartially and effectually inquire, examine and decide, otherwise the Court will interpose its authoritative administration. In short, while the superior Court will not divest the inferior Court of its responsibility to perform its jurisdiction, it will call upon it to act and undertake that duty, where it appears that it has refused it. But where the inferior Court has considered

9. Not to undo something.

(9) The act required must be not merely one that will undo an act that has already been done, but one that ought to be done and has not been done (*m*).

How obtained.

The writ of mandamus has ordinarily been obtained on

the matter before it, and informed its conscience thereon, and decided the matter, the superior Court will not interfere."

R. v. *Archbishop of Canterbury* (1812), 15 East, 117.

Ex parte Becke (1832), 3 B. & Ad. 704.

And per Littledale, J. :—"The Court cannot dictate by mandamus the judgment which another Court shall give, such as the quashing a rate, which is a judicial act—though it can refer it to them to consider what judgment they should pronounce."

R. v. *Middlesex Justices* (1839), 9 A. & E. 540.

And per Abbott, C. J. :—"We ought to see clearly that the magistrates have neglected some duty imposed upon them by law before we compel them to act in a particular mode."

R. v. *N. Riding of Yorkshire* (1823), 2 B. & C. 286.

And per Best, J. :—"If the law requires a certain thing to be done, we may order it to be done by the party upon whom the obligation of doing it is imposed. If he is to act according to his discretion, and will not act or even consider the matter, we may compel him to put himself in motion to do the thing, but we cannot control his discretion."

R. v. *N. Riding of Yorkshire, ubi sup.*

And per Coleridge, J. :—"There is a well-known distinction with respect to the cases in which this Court will interfere with the decisions of an inferior Court. If the inferior Court abstains from entering upon the merits in consequence of their arriving at a wrong decision upon a preliminary point, this Court will set them right."

Reg. v. *Richards* (1851), 20 L. J. Q. B. 351.

It is the peculiar business of the superior Courts of the Queen's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the Crown or legislature have invested them ; and this not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice.

3 Bl. Com., 21st ed., p. 109. See also *Glossop* v. *Heston, &c. Board* (1879), 12 Ch. D. 102.

So, the Court will grant a mandamus to a clergyman who absolutely refuses to bury a body brought to him for interment in the usual way (*R.* v. *Coleridge* (1819), 2 B. & A. 806) ; but it will not grant a mandamus to compel him to bury it in a particular portion of the churchyard, as he has a right of discretion in that respect.

Ex parte Blackmore (1830), 1 B. & A. 122.

And where a County Court judge has heard and considered a matter, and decided that he has no jurisdiction, a mandamus will not lie even though his decision may be wrong in law ; for it is a decision on the evidence which the superior Court will not review.

Ex parte Milner v. *Rhoden* (1851), 15 Jur. 1037.

But if in a case in which he has jurisdiction he refuses to hear it upon the mistaken belief that he has no jurisdiction to do so in respect of some preliminary matter, a mandamus will issue, Erle, J., distinguishing the somewhat similar case of *R.* v. *Richards* (1851), 20 L. J. Q. B. 351, where the refusal of the inferior Court to adjudicate was in respect of a preliminary matter, the High Court being of opinion that the judge was wrong in his decision as to the preliminary matter, and considering that the case fell within the general principle, that where an inferior tribunal improperly refuses to *enter upon* a complaint, a mandamus will issue.

(*m*) *Ex parte Nash* (1850), 15 Q. B. 92.

1. Prerogative writ.

motion of counsel (*n*), supported by a suggestion on oath or affidavit of the party injured of his right, and of denial of justice by the defendant, whereupon, in order more fully to satisfy the Court that there is a probable ground for its interposition, a rule *nisi* is made (except in some general cases where such ground is manifest) (*o*), requiring the defendant to show cause why a writ of mandamus should not issue.

Officials need not appear.

It was, however, provided by statute (*p*), that officers and other persons obliged to perform matters in which they had no interest should be relieved of the duty of appearing, the Court being empowered to call upon any other person having or claiming any interest in the matter to appear and show cause against the issue of the writ.

On sufficient cause being shown, the writ is made absolute and issued, commanding the defendant by return day either to execute the command, or to signify to the Court some reason for not doing so; failure to do so, subjecting him to attachment for his contempt. Or, the Court or a judge may now, by Ord. XLII. r. 30, in the case of a mandamus granted in an action or otherwise, besides or instead of proceedings for contempt, direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or some other person appointed by the Court or judge, at the cost of the disobedient party.

Procedure under C. O. R.

By the Crown Office Rules of 1886 (*q*), applications for the prerogative writ of mandamus are to be made during the sittings to Divisional Courts of the Queen's Bench Division by motion for an order *nisi;* and, in the Vacation, to a judge in chambers for a summons to show cause, upon its being shown to such judge that the matter is urgent. The rule, however, does not apply to applications under the Municipal Corporations Act, 1882, s. 225 (*r*), by which a mandamus may be obtained to proceed to an election of a corporate officer, the procedure relating to which is laid down in that enactment.

(*n*) Counsel must be instructed on applications for a mandamus, though, possibly, not for a rule *nisi*. *R.* v. *Liverpool* (*Mayor of*) (1891), 7 T. L. R. 592; 55 J. P. 823.

(*o*) But where it appears that there is a question of consequence to be determined, the Court will not decide it on the motion, but will direct the writ to issue, that the question may be decided on the return. *Rex* v. *Everet* (1736), cas. temp. Hardwicke, 261.

(*p*) 1 Will. 4, c. 21, s. 4.

(*q*) Rr. 60 *et seq.*

(*r*) 45 & 46 Vict. c. 50, s. 225.

1. Prerogative writ—*contd.*

The order *nisi* must give notice to, and be served upon, every person likely to be interested, or who, in the opinion of the Court, should be served, as well as the party required to show cause; but any person, whether he has had notice or not, may show cause if he can satisfy the Court or judge that he is affected by the proceeding, and may be made liable for costs.

The Court or a judge may order that any writ of mandamus may be peremptory in the first instance.

No order for the issuing of any writ of mandamus is to be granted unless, at the time of moving, an affidavit be produced by which some person deposes upon oath that the motion is made at his instance as prosecutor; and his name will be so indorsed on the writ if granted.

Ord. LVIII. of the Rules of the Supreme Court is to apply to all civil proceedings on the Crown side, including mandamus (*r*).

Orders applied to mandamus.

The following orders also are, by Ord. LXVIII. r. 2, so far as they are applicable, to apply to proceedings in mandamus:—Those relating to Amendment (*s*); Special Case (*t*); Affidavits (*u*); Motions (*x*); Appeals (*y*); Time (*z*); Costs (*a*); Notices (*b*); Non-compliance (*c*).

2. The statutable writ.

Different to the prerogative writ is the mandamus spoken of in the Judicature Act, 1873 (*d*), which is only a mandamus which may be granted to direct the performance of some act —of something to be done—which is the result of an action where an action will lie (*e*). The section of the Judicature Act referred to provides that a mandamus may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, either unconditionally or upon terms; the words "interlocutory order" meaning any order other than a final judgment, and whether made before or after it (*f*).

(*r*) C. O. R. 1886, r. 216.
(*s*) Ord. XXVIII.
(*t*) Ord. XXXIV.
(*u*) Ord. XXXVIII.
(*x*) Ord. LII.
(*y*) Ord. LVIII.
(*z*) Ord. LXIV.
(*a*) Ord. LXV.
(*b*) Ord. LXVI.
(*c*) Ord. LXX.
(*d*) Sect. 25 (8).
(*e*) Per Brett, L. J., in *Glossop* v. *Heston, &c. Board* (1879), 12 Ch. D. 102, at p. 122.
(*f*) *Easton* v. *Nar Valley Commissioners* (1892), 8 T. L. R. 649.

2. The statutable writ—*contd.*

How obtained.

Applications for orders directing the issue of writs of mandamus under the Judicature Act are directed to be made to the Court or a judge (*g*), either *ex parte* or with notice; and judges of the Chancery Division have jurisdiction to direct the issue of writs of mandamus under that Act in every cause or matter pending before them (*h*).

Order substituted for writ against inferior Courts.

By the County Courts Act, 1888 (*i*), an order or summons is substituted for the writ of mandamus to a judge or an officer of a County Court, for refusing to do any act relating to the duties of his office (*k*), and the party requiring such act to be done may apply to the High Court, upon an affidavit of the facts, for an order or summons calling upon such officer of the Court, and also the party affected by the act, to show cause why it should not be done (*l*). If after service of such order or summons good cause is not shown, the High Court may, by order, direct the act to be done, and the judge or officer of the County Court, upon being served with it, must obey it on pain of attachment. And the High Court can in any event make such order as to costs as it thinks fit (*m*).

May appeal on refusal.

When an application for such a writ or order has been once refused by the High Court or a judge thereof, no other

(*g*) Ord. L. r. 6. The jurisdiction may be exercised by a judge sitting at chambers: 92 L. T. Jo., p. 40 (1891).

(*h*)——*In re Paris Skating Rink Co.* (1877), 6 Ch. D. 731.

But applications for the prerogative writ must still be made to the Queen's Bench Division.

Glossop v. *Heston, &c. Board* (1879), 12 Ch. D. 102.

R. v. *Lambourn, &c. Co.* (1888), 22 Q. B. D. 463, at p. 469.

(*i*) 51 & 52 Vict. c. 43, s. 131.

(*k*) This is, in substance, a re-enactment of sect. 43 of 19 & 20 Vict. c. 108 (County Courts Act, 1856), which first substituted a rule or order for a mandamus to a judge or officer of a County Court. See also

Blades v. *Lawrence* (1874), L. R. 9 Q. B. 374; 43 L. J. Q. B. 133; 30 L. T. 378; 22 W. R. 643,

which decides that the substituted rule or order applies to the City of London Court.

But where a matter is not within the ordinary jurisdiction of a County Court judge, but his jurisdiction to hear it is imposed upon him by statute, he is bound to hear and determine it, and a mandamus is the proper course to compel him to do so, and not a rule under the County Courts Act.

In re Brighton Sewers Board (1882), 9 Q. B. D. 723.

Such a rule will be granted calling on a County Court judge to show cause why the verdict of a jury should not be received and entered, and judgment given accordingly, when he has refused to receive and enter, and give judgment according to such verdict.

Jardine v. *Smith* (1860), 8 W. R. 464.

(*l*) As in the case of an application for the prerogative writ. C. O. R. 1886, r. 60 *et seq.*, *vide supra*, p. 82.

(*m*) County Courts Act, 1888, s. 131. A similar discretion exists in applications for the prerogative writ. *R.* v. *Harding* (1890), 6 T. L. R. 175.

Court or judge is to grant it (*o*), though the applicant is not prevented from appealing or from applying again on different grounds (*p*).

Ord. LIII. Action of mandamus.

Ord. LIII. of the Rules of the Supreme Court provides that the plaintiff, in any action in which he shall claim a mandamus to command the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested, shall indorse such claim upon the writ of summons.

The mandamus given by this action (which is not the prerogative writ) corresponds with that which was provided by the Common Law Procedure Act, 1854 (*q*), which latter provision the Judicature Act, 1873, and Ord. LIII. together, in substance re-enact (*r*). The Act of 1854 also expressly reserved to the separate jurisdiction of the Queen's Bench Division the power to grant prerogative writs of mandamus, which jurisdiction that Division accordingly continued to exercise (*s*).

This action for a mandamus, based upon the Common Law Procedure Act, is simply an attempt to engraft upon the old common law remedy a right in the nature of specific performance (*t*). When private persons had rights against one another, the Court had power to grant a mandamus, or direct specific performance, or something in the nature of an injunction, to command that the right claimed by the one party should be acceded to by the other. But it was never contemplated that the action for a mandamus was to supersede the prerogative writ of mandamus (*u*).

Statutable and prerogative writs of mandamus compared.

The term statutable mandamus, used by Mr. Justice Day in the case last cited, is a convenient one for the purpose of distinguishing the statutory process from the prerogative writ issuable alone from the Queen's Bench Division.

The statutable mandamus is only granted as auxiliary to an action, and for the purpose of enforcing the private right

(*o*)——*R.* v. *Bodmin* (*Mayor of*), (1892) 2 Q. B. 21; 66 L. T. 562; 61 L. J. M. C. 151; 40 W. R. 606; 56 J. P. 504.
Ex parte Thompson (1845), 6 Q. B. 721.

(*p*)——County Courts Act, 1888, s. 131.
Reg. v. *Bishop of London* (1889), 24 Q. B. D. 213.
Reg. v. *Holl* (1881), 7 Q. B. D. 575.
Julius v. *Bishop of Oxford* (1880), 5 App. Cas. 214.

(*q*) 17 & 18 Vict. c. 125, s. 68.

(*r*) Per Pollock, B., in *R.* v. *Lambourn, &c. Co.* (1888), 22 Q. B. D. 463, at p. 467.

(*s*) 17 & 18 Vict. c. 125, s. 75; and *R.* v. *Lambourn, &c. Co.*, *ubi sup.*

(*t*) See the judgment of Mr. Justice Day in *Baxter* v. *London C. C.* (1891), 63 L. T. 767; 55 J. P. 391.

(*u*) Per Day, J., in *Baxter* v. *London C. C.*, *ubi sup.*

in respect of which the private litigation arose (*v*). Hence it follows that the statutable mandamus will not issue where no action will lie (*x*).

(*v*) Per Day, J., in *Baxter* v. *London C. C.*, *ubi sup.*

(*x*) Quite otherwise is the case of the prerogative writ, one of the essential conditions for the grant of which is, as has been seen, that the applicant shall have no specific legal remedy whereby fulfilment of his right may be compelled. *Vide supra*, p. 79, and the cases there cited.

CHAPTER XVII.

PROHIBITION.

Object of prohibition.

As all external jurisdiction is derived from the Crown, and the administration of justice is committed to a great variety of Courts, it has been the care of the Crown that these Courts keep within the limits and bounds of the several jurisdictions prescribed them by the laws and statutes of the realm.

For this purpose the writ of prohibition was framed, which issues out of the superior Courts of common law to restrain inferior Courts, no matter what their nature, where it is shown that the cognizance of the matter does not belong to such Courts.

The object of prohibitions in general is the preservation of the right of the king's Crown and Courts, and the ease and quiet of the subject. For it is the wisdom and policy of the law to suppose both best preserved when everything runs in its right channel according to the original jurisdiction of every Court. For by the same reason that one Court might be allowed to encroach, another might; which could produce nothing but confusion and disorder in the administration of justice (*a*).

Coke on prohibition.

It is laid down by Coke, in his Institutes (*b*), that:—"Prohibitions by law are to be granted at any time to restrain a Court to intermeddle with, or execute anything, which by law they ought not to hold plea of. . . . And the King's Courts that may award prohibitions, being informed either by the parties themselves or by any stranger, that any Court temporall or ecclesiasticall doth hold plea of that whereof they have not jurisdiction, may lawfully prohibit the same as well after judgement and execution as before" (*c*).

(*a*) Bac. Abr. tit. Proh., and cases and authorities there cited.

(*b*) 3 Jac. 1, Pt. 2, p. 602, *Articuli Cleri*.

(*c*)——See also *Kimpton* v. *Willey* (1850), 9 C. B. 719; 19 L. J. 269; and the old case of *Hall* v. *Norwood* (temp. 15 Car. 2), 1 Sid. 165, in which it is said that "*Prohibition ne serra apres le cause determine.*" Also *Denton* v. *Marshall* (1863), 32 L. J. Ex. 89; 1 H. & C. 654; 9 Jur. N. S. 337; 11 W. R. 268; citing Com. Dig. Proh., and *Roberts* v. *Humby* (1837), 3 M. & W. 120; M. & H. 331; 6 D. P. C. 82.

The opinion obtained that the awarding of a prohibition might be discretionary (*d*), none being entitled to it, however, who was not in danger of being injured by some suit actually impending (*e*). Whether discretionary or as of right.

The subject was fully considered by the Court of Appeal in the recent case of *Farquharson* v. *Morgan* (*f*), in which it was laid down that when a total absence of jurisdiction appears on the face of the proceedings in an inferior Court, the Court is bound to issue a prohibition, though the applicant for the writ has consented to, or acquiesced in, the exercise of jurisdiction by the inferior Court. *Farquharson* v. *Morgan*.

Lord Justice Lopes said there had always been recognized a distinction between what he called a latent want of jurisdiction (or something becoming manifest in the course of the proceedings), and a patent want of jurisdiction (or a want of jurisdiction apparent on the face of the proceedings). Whilst in cases of latent want of jurisdiction there had always been a great conflict of judicial opinion as to whether the grant of the writ was discretionary or not, the authorities seemed unanimous in deciding that where the want of jurisdiction is patent, the grant of the writ of prohibition is as of course. Depends on latent or patent want of jurisdiction.

The Lord Justice referred to *Buggin* v. *Bennett* (*g*), where Lord Mansfield held that the Court was not bound to grant prohibition to a party who had acquiesced in the proceedings of a Court below, except where the absence of jurisdiction was apparent on the face of the proceedings; and also to *Bodenham* v. *Ricketts* (*h*), where Lord Denman laid down a similar rule; to *Yates* v. *Palmer* (*i*), a considered judgment of the Court of Queen's Bench, which adopted that rule; to *Mayor of London* v. *Cox* (*j*), mere acquiescence not giving jurisdiction (*k*); and to *Broad* v. *Perkins* (*l*), argued before a full Court of Appeal, which adopted the opinion of Willes, J., in *Mayor of London* v. *Cox*. The reason why prohibition is granted, notwithstanding acquiescence, is, as Lord Denman said (*m*), "lest the case might become a precedent if allowed Effect of acquiescence.

(*d*) Bac. Abr. tit. Proh., citing Raym. 3, 4; and see also Sid. 55, where prohibition was said by the judges to be *ex debito justitiæ*, and *de gratia*.

(*e*) Bac. Abr. *ibid.* A prohibition *quia timet* does not lie: Allen, 36.

(*f*) (1894) 1 Q. B. 552; 63 L. J. Q. B. 474; 70 L. T. 152; 42 W. R. 306; 58 J. P. 495; 9 R. 202.

(*g*) (1767), 4 Burr. 2035.

(*h*) (1836), 6 N. & M. 170.

(*i*) (1849), 6 D. & L. 283.

(*j*) (1866), L. R. 2 H. L. 239; 36 L. J. Ex. 225.

(*k*) *Knowles* v. *Holden* (1855), 24 L. J. Ex. 223.

(*l*) (1888), 21 Q. B. D. 533; 57 L. J. Q. B. 638; 37 W. R. 44; 60 L. T. 8; 53 J. P. 39.

(*m*) *Bodenham* v. *Ricketts* (1836), 6 N. & M. 170.

to stand without impeachment"; or, as Lord Justice Lopes considered (*n*), because it is a want of jurisdiction of which the Court is informed by proceedings before it, and which the judge should have observed, and of which he himself should have taken notice.

Lord Justice Davey, after referring to the remarks of Parke, B., in *Roberts* v. *Humby* (*o*), said the reason for the distinction between cases in which the excess of jurisdiction appears on the face of the proceedings, and where it does not so appear, is thus explained by Coleridge, J. (*p*):—"There is reason for refusing the writ, after judgment, in the Court where the proceedings set forth the detail of the matter, and the party has the opportunity for moving for judgment. Then, if he chooses to wait and take his chance of the judgment being in his favour, he may be held incompetent to complain of excess of jurisdiction if the judgment is against him. There is, however, good reason for departing from this principle where the defect is apparent on the face of the proceedings below, because the complaint in that case does not rest on the evidence of the complainant; and if such a defective record were allowed to remain and to support a judgment, it might become a precedent: that which was in truth an excess of jurisdiction might be considered to have been held to be legal." To which Lord Justice Davey added that the learned judge was evidently contrasting cases where the excess of jurisdiction depends on the evidence of the complainant with cases in which it is apparent on the face of the proceedings. The case of *Mouflet* v. *Washburn* (*q*) seemed to have been a case like *In re Jones and James* (*r*), where Erle, J., treated the matter as an irregularity in practice, which might be cured by waiver.

In *Jones* v. *Owen* (*s*), however, where it was contended that the defendant's attorney had not objected to the jurisdiction, Patteson, J., said "there was a total want of jurisdiction which no assent could cure."

So, in *Taylor* v. *Nichols* (*t*), Brett, J., thought it obligatory on the Court to grant a prohibition if it be clear upon the law and the facts that the inferior tribunal is proceeding without jurisdiction.

(*n*) *Farquharson* v. *Morgan*, (1894) 1 Q. B. 552; 63 L. J. Q. B. 474; 70 L. T. 152; 42 W. R. 306; 58 J. P. 495; 9 R. 202.
(*o*) (1837), 3 M. & W. 120; M. & H. 331; 6 D. P. C. 82.
(*p*) *Marsden* v. *Wardle* (1854), 3 E. & B. 695, at p. 701; 2 C. L. R. 1707; 23 L. J. Q. B. 263; 18 Jur. 578.
(*q*) (1886), 54 L. T. 16.
(*r*) (1850), 19 L. J. Q. B. 257.
(*s*) (1848), 5 D. & L. 669; 18 L. J. Q. B. 8; 13 Jur. 261.
(*t*) (1876), 1 C. P. D. 242.

And the same learned judge, delivering the judgment of the Court of Common Pleas in *Worthington* v. *Jeffries* (*u*), said the Court has, in some cases, a discretion to refuse to prohibit, as where there is a doubt as to what is the true state of the facts, or as to the law applicable. But if the defendant make it clear that, both in fact and law, the inferior Court is proceeding without or beyond jurisdiction, the superior Court is judicially bound, *ex debito justitiæ*, to issue a writ of prohibition; and in such a case where the defendant in the inferior Court is the applicant, it is not a reason for refusal that the amount in dispute is small, or that the application is made late (*x*).

Grounds on which granted.

The grounds upon which prohibition is granted are not whether a suitor has or has not suffered damage, but whether the prerogative has been encroached upon by reason of the prescribed order of the administration having been disobeyed (*y*).

So, where the foundation for the jurisdiction of the inferior Court is itself defective, prohibition may be applied for at once. But where the inferior Court proceeds in a cause properly within its jurisdiction no prohibition can be awarded until the pleadings raise some issue which the Court is competent to try (*z*).

Mayor of London v. *Cox* (1866).

In the case last cited two questions were put by the House of Lords to the judges:—

(1) Whether the plea (in prohibition) setting up an ancient custom of foreign attachment of persons within the boundaries of the Mayor's Court, even where the debt did not arise within its jurisdiction, was a sufficient answer? and

(2) Whether the garnishees in the Mayor's Court could maintain an action for prohibition without having pleaded in the Mayor's Court?

(*u*) (1875), L. R. 10 C. P. 379; 44 L. J. C. P. 209; 32 L. T. 606; 23 W. R. 750.

(*x*) And he cited the definition of Prohibition given in Bacon's Abridgment, *vide supra*; also the second answer in *Articuli Cleri*, 2nd Inst., p. 602, *vide sup.*; also tenth answer, *ibid.*; also

Mayor of London v. *Cox* (1866), L. R. 2 H. L. 239; 36 L. J. Ex. 225; 16 W. R. 44, which "seems to exhaust all learning and ingenuity on questions of Prohibition." See also

Jackson v. *Beaumont* (1855), 24 L. J. Ex. 301.

(*y*)——Per Brett, J., in *Worthington* v. *Jeffries* (1875), *ubi sup.*; citing

Wadsworth v. *Queen of Spain* (1851), 17 Q. B. 171; 20 L. J. Q. B. 488, and distinguishing

Forster v. *Forster and Berridge* (1863), 4 B. & S. 187; 32 L. J. Q. B. 312.

(*z*) *Mayor of London* v. *Cox* (1866), L. R. 2 H. L. 239; 36 L. J. Ex. 225.

The judges answered the first question in the negative, and the second in the affirmative.

They held that the custom of foreign attachment could not in reason apply to debts or garnishees out of the jurisdiction, citing and approving *Turbill's Case* (*a*):—"To give jurisdiction to the Lord Mayor's Court of London, it is not sufficient that the garnishee reside within the city; the debt due from the defendant to the plaintiff must also have accrued there;" and *De Haber* v. *Queen of Portugal* (*b*), where Lord Campbell expressed the same view; and also *McDaniel* v. *Hughes* (*c*), *Burder* v. *Veley* (*d*), and the cases there collected in the judgment of Tindal, C. J. In the latter case the argument was, "Why not appeal?" Here it was, "Why not pay?" and the answer was, "I am harassed by process which is unauthorised, and I choose to protect myself by prohibition."

The judges also approved the doctrine (*e*) that in local Courts the general rule is that the person proceeded against must be resident, and that the locality of a debt does not follow the person of a garnishee as though he carried it on his back.

There are some exceptions, however, which from their very nature must be first raised in the Court below (*f*), as where there is a general jurisdiction over the subject-matter, but a defence is raised which the Court is incompetent to try (*g*).

In considering the case of a prohibition for want of jurisdiction the question is, not whether the party or Court has done a wilful wrong, but "whether the Court has or has not jurisdiction" (*h*); and it seems that prohibition, when granted, may be either absolute or *hoc usque* only until such an act be done (*i*).

May be absolute or *hoc usque*.

Ord. LIX. r. 8a.

It is provided by Ord. LIX. r. 8a, of the Rules of the Supreme Court, that every application for a prohibition to a County Court other than an application by the Attorney-General, is to be brought by notice of motion served on the parties to the proceedings in the County Court, or such of them as may not be applicants for the prohibition. By rule 81 of the Crown Office Rules, 1886, application is

C. O. R. 81.

(*a*) (19 Car. 2), 1 Wms. Saund. 67.
(*b*) (1851), 17 Q. B. 171; 20 L. J. Q. B. 488.
(*c*) (1803), 3 East, 367.
(*d*) (1841), 12 Ad. & E. 309.
(*e*) As laid down in *Grigg's Case* (10 Jac.), Hutton, 59.
(*f*) *Blacquiere* v. *Hawkins* (1780), 1 Dougl. 378.
(*g*)——*Duke of Rutland* v. *Bagshaw* (1850), 14 Q. B. 869.
French v. *Trask* (1808), 10 East, 348.
Byerley v. *Windus* (1826), 5 B. & C. 1.
(*h*) *Ede* v. *Jackson* (12 Geo. 1), Fort. 345.
(*i*) Bac. Abr. tit. Proh.

made in civil proceedings on the Crown side by motion for an order *nisi*, or by summons before a judge at Chambers.

In the result, application for a writ of prohibition to a County Court may be made either to a Divisional Court or to a judge at Chambers. It is at the option of the applicant to employ either process. If he applies in open Court, he must proceed by notice of motion instead of applying for an order *nisi*, as under the former practice (*k*). How applied for.

And orders made on such applications may be made absolute *ex parte*, in the first instance, on special circumstances being shown, in the discretion of the Court (*l*). C. O. R. 82.

By the County Courts Act, 1888, applications for writs of prohibition to any Court may be heard and determined by any judge of the High Court, as well during the sittings as in vacation, who may also make such orders for the issuing of such writs as might have been made by the High Court (before the passing of the County Courts Act, 1888), and all such orders so made by any such judge of the High Court are to have the same force and effect as they had before (*m*). County Courts Act, 1888, s. 127.

All such applications will be finally disposed of by order, and no declaration or further proceedings in prohibition will be allowed. The judge of the Court to be prohibited is not served with notice of the proceedings, and is not, except by order, required to appear or be heard therein, or liable to pay the costs thereof. Sect. 128.

The application proceeds as if it were an appeal, notice being served on such parties as would have been served in the case of an order made or refused by a judge in a matter within his jurisdiction (*n*).

The grant of an order or summons to show cause why a writ of prohibition should not issue only operates as a stay of proceedings if the High Court or judge so directs (*o*); and a copy of the order should be served on the other side, and on the registrar, two clear days before the day fixed for the trial of the action or matter; and a similar duty exists where the writ of prohibition has been granted on an *ex parte* application (*p*). Sect. 129. Sect. 130.

Neither a Master in the Queen's Bench Division, nor a Registrar in the Probate, Divorce, and Admiralty Division, Master cannot grant.

(*k*) Per Mathew, J., in *King* v. *Charing Cross Bank* (1889), 24 Q. B. D. 27.
(*l*) C. O. R. 1886, r. 82.
(*m*) County Courts Act, 1888, s. 127.
(*n*) *Ibid.* s. 128.
(*o*) *Ibid.* s. 129.
(*p*) *Ibid.* ss. 129, 130.

has jurisdiction to make orders in prohibition (*q*), it being vested only in the judges (*r*).

Orders applied to prohibition.

By Ord. LXVIII. r. 2, the orders relating to Amendment (*s*), Special Case (*t*), Affidavits (*u*), Motions (*x*), Appeals (*y*), Time (*z*), Costs (*a*), Notices (*b*), and Non-compliance (*c*) are, so far as they are applicable, to apply to all civil proceedings on the Crown side of the Queen's Bench Division, including prohibition.

High Court proceedings cannot be restrained.

No cause or proceeding pending in the High Court can be restrained by prohibition (*d*).

Remedy on refusal is by appeal.

When the Court refuses to grant a writ of prohibition no other Court will do so, though the applicant may appeal (*e*).

Old practice.

Under the old practice an applicant might move for the writ in one Court, and if there refused, move again in another. But then there was no appeal. The right of appeal having been given by the Judicature Act, 1873, s. 19, it is unnecessary that the old practice should continue, and, in the opinion of the Master of the Rolls, it is the real object of sect. 132 of the County Courts Act, 1888, to do away with it. So, where an applicant has applied to a judge of the High Court, he cannot, if refused, go to another judge; and if he has applied to a Divisional Court, he is precluded from moving another Divisional Court. But he may appeal in either case.

In vacation.

And when prohibition is applied for to a judge sitting in vacation, that judge exercises the jurisdiction of all the Divisions; so that when there is an Admiralty case before him, he acts as a judge of the Admiralty Division, with all the powers of a judge of the High Court; and an appeal will lie direct from the Admiralty judge to the Court of Appeal (*f*).

(*q*) Ord. LIV. r. 12 (g).
(*r*) Judicature Act, 1873, s. 16; *The Recepta*, (1893) P. 255; 69 L. T. 252; 41 W. R. 561.
(*s*) Ord. XXVIII.
(*t*) Ord. XXXIV.
(*u*) Ord. XXXVIII.
(*x*) Ord. LII.
(*y*) Ord. LVIII.
(*z*) Ord. LXIV.
(*a*) Ord. LXV.
(*b*) Ord. LXVI.
(*c*) Ord. LXX.
(*d*) Judicature Act, 1873, s. 24 (5).
(*e*)——*The Recepta*, (1893) P. 255; 69 L. T. 252; 41 W. R. 561; 62 L. J. P. 18.
Barton v. *Titchmarsh* (1880), 49 L. J. Ex. 573; 42 L. T. 610; 28 W. R. 821.
(*f*) Per Ld. Esher, M. R., *The Recepta*, (1893) P. 255; 62 L. J. P. 18; 69 L. T. 252; 41 W. R. 561.

Where prohibition was, in an old case, moved on three several grounds, Holt, C. J., disapproved of matters being joined which formed grounds of a different nature (*g*); but more recently it was held that where a plaint contains two claims, one of which is within and the other without the jurisdiction, a prohibition may be granted as to one only (*h*). Grounds should be similar.

The right to grant a writ of prohibition not belonging exclusively to the Crown side of the Queen's Bench Division, though usually moved for on that side (*i*), the High Court, in making a rule absolute for a prohibition without pleadings, may make an order for costs (*k*). Costs.

Where pleadings in prohibition are ordered, the pleadings and subsequent proceedings, including judgment and assessment of damages, if any, are to be, as nearly as may be, the same as in an ordinary action for damages (*l*). Pleadings.

And it was held (*m*) that a judge sitting at chambers has jurisdiction to set aside a writ of prohibition issued out of the Petty Bag Office (*n*).

The defendant in an action in the Mayor's Court may obtain a writ of prohibition notwithstanding sect. 15 of the Mayor's Court Procedure Act, 1857, which only limits the modes of objecting, within the Mayor's Court itself, to its jurisdiction (*o*). Against Mayor's Court.

Though usually granted by the common law Courts, the Court of Chancery has an ancient and undoubted jurisdiction to grant the writ (*p*). Court of Chancery may grant.

(*g*) *Anon.* (3 Anne), 6 Mod. 308.

(*h*)——Per Pollock, B., in *R.* v. *Westmoreland County Court* (1888), 58 L. T. 417; 36 W. R. 477. See also *Godfrey* v. *Lazarus* (1887), 4 T. L. R. 101. *In re Walsh* v. *Ionides* (1853), 1 E. & B. 383; 22 L. J. Q. B. 137; 17 Jur. 596. *Free* v. *Burgoyne* (1826), 2 Bligh, N. S. 65; 6 B. & C. 27, 538; 9 D. [& R. 14.

(*i*) *The Recepta*, (1893) P. 255; 69 L. T. 252; 41 W. R. 561.

(*k*)——*Reg.* v. *Justices of City of London*, (1894) 1 Q. B. 453; 63 L. J. Q. B. 301; 70 L. T. 148; 42 W. R. 225; 58 J. P. 380. *Wallace* v. *Allen* (1875), L. R. 10 C. P. 607; 44 L. J. C. P. 351; [32 L. T. 830; 23 W. R. 351.

(*l*) Ord. LXVIII. r. 3.

(*m*) *Amstell* v. *Lesser* (1885), 16 Q. B. D. 187; 55 L. J. Q. B. 114; 53 L. T. 759; 34 W. R. 230.

(*n*)——*Kyrburg* v. *Posanski* (1884), 13 Q. B. D. 218. And see *Swain* v. *Cox* (1850), 1 C. C. A. 362, where a prohibition which upon its face appeared to be regular was not set aside, though issued *ex parte*.

(*o*) *Jacobs* v. *Brett* (1875), L. R. 20 Eq. 1; 44 L. J. Ch. 377; 32 L. T. 522; 23 W. R. 556.

(*p*)——*Ibid.*, per Jessel, M. R., disapproving Crompton, J., in *Manning* v. *Farquharson* (1860), 29 L. J. Q. B. 22; 6 Jur. N. S. 1300, and *Baker* v. *Clark* (1873), L. R. 8 C. P. 121; but approving *Quartly* v. *Timmins* (1874), L. R. 9 C. P. 416; 22 W. R. 488; and *Cooke* v. *Gill* (1873), L. R. 8 C. P. 107; 42 L. J. C. P. 98; 28 L. T. 32; 21 W. R. 334.

Appeal from Divisional Court lies without leave.

An appeal lies, without leave, from the decision of a Divisional Court upon an application for a prohibition to a County Court, inasmuch as a general right of appeal existed before the passing of the County Courts Act, 1888, and is not taken away by sect. 128 of that Act, which directs that "the application [for a prohibition] shall be proceeded with and heard in the same manner in all respects as any case of an appeal duly brought from a decision of a judge." This section relates only to procedure in the High Court, and leaves the right of appeal in the same position as it was before the Act (*q*).

Obtaining special case not acquiescence.

A party who objected that a County Court judge had no jurisdiction to determine a plaint was held not to have acquiesced in the jurisdiction of that Court, or to have waived his right to a writ of prohibition by obtaining from the judge the statement of a case for the opinion of a superior Court (*r*).

Cases considered.

Prohibitions have been granted (*e.g.*) *in the following circumstances*:—

Where the whole cause of action did not arise in a certain locality, so as to give jurisdiction to the local Court to try it (*s*);

Where the judge in effect left with the jury the question whether he had jurisdiction or not (*t*);

Where the inferior Court has wrongly decided a fact which gave it jurisdiction (*u*);

Where a County Court judge ordered a bailiff outside his jurisdiction to compensate an execution debtor (*x*);

Where a County Court judge made an order for pay-

(*q*) *Lister* v. *Wood* (1889), 23 Q. B. D. 229; 37 W. R. 738; 53 J. P. 773.

(*r*) *Jackson* v. *Beaumont* (1855), 11 Ex. 300; 24 L. J. Ex. 301.

(*s*) ——*E.g.*, *Borthwick* v. *Walton* (1855), 15 C. B. 501; 24 L. J. C. P. 175; 1 Jur. N. S. 142; 3 C. L. R. 364.
Whinney v. *Schmidt* (1873), L. R. 8 C. P. 118.
De Haber v. *Queen of Portugal* (1851), 17 Q. B. 171; 20 L. J. Q. B. 488; 41 W. R. 153.
Cooke v. *Gill* (1873), L. R. 8 C. P. 107; 42 L. J. C. P. 98; 28 L. T. 32; 21 W. R. 334.
Robinson v. Emanuel (1874), L. R. 9 C. P. 414; 43 L. J. C. P. 244; 30 L. T. 500.

(*t*) *Jackson* v. *Beaumont* (1855), 11 Ex. 300; 24 L. T. 301.

(*u*) ——*Liverpool Gas Co.* v. *Everton* (1871), L. R. 6 C. P. 414; 40 L. J. M. C. 104; 23 L. T. 813; 19 W. R. 412.
Elstone v. *Rose* (1868), L. R. 4 Q. B. 4; 38 L. J. Q. B. 6; 19 L. T. 280; 17 W. R. 52; 9 B. & S. 509.

(*x*) *Reg.* v. *Shropshire County Court* (1887), 20 Q. B. D. 242; 57 L. J. Q. B. 143; 58 L. T. 86; 33 W. R. 476.

ment by instalments, the debtor to be committed upon default in paying any instalment (*y*);

Where there was a total want, or clearly excessive exercise, of jurisdiction (*z*), even where there had been an evident breach of contract (*a*);

Where there existed a *bonâ fide* dispute as to title to land, without waiting to inquire as to whether the title actually set up was good in fact (*b*);

Where a single cause of action was wrongfully divided, such portion being, as to pecuniary value, within the Court's jurisdiction (*c*);

Where the judge nonsuited the plaintiff, and awarded costs to the defendant in an action of trespass, on title to the land being set up (*d*);

Where the County Court judge awarded costs on a scale greater than the amount claimed without certifying that the action involved some difficult point of law, or that the question was of some public interest (*e*);

(*y*)——*Reg.* v. *Brompton County Court* (1886), 18 Q. B. D. 213; 57 L. J. Q. B. 510; 59 L. T. 66; affirmed on appeal, in *Stonor* v. *Fowle* (1887), 13 App. Cas. 20, as to this point, by the House of Lords, though the judgment of the Court of Appeal was reversed on other grounds, adopting the rule laid down by Willes, J., in *Re Debtors Act*, 1869 (1870), 22 L. T. 666, that the judge cannot make a prospective order for committal in default of payment by instalments.

(*z*)——*In re Walsh* v. *Ionides* (1853), 1 E. & B. 383; 22 L. J. Q. B. 137; *Chambers* v. *Green* (1875), L. R. 20 Eq. 552; 44 L. J. Ch. 600; approving *In re Forster* (1863), 4 B. & S. 187; 3 S. & T. 144; 31 L. J. Mat. 185; 9 L. T. 147; and not following *Worthington* v. *Jefferies* (1875), L. R. 10 C. P. 379; 32 L. T. 606; 23 W. R. 750; 44 L. J. C. P. 209.

(*a*) *In re Walsh* v. *Ionides* (1853), 1 E. & B. 383; 22 L. J. Q. B. 137.

(*b*)——*Sewell* v. *Jones* (1850), 1 L. M. & P. 525; 19 L. J. Q. B. 372; 15 Jur. 153; *Pearson* v. *Glazebrook* (1867), L. R. 3 Ex. 27; 37 L. J. Ex. 15; 17 L. T. 260.

But the claim must be a *bonâ fide* one, and the right claimed one that can exist in point of law.

Lloyd v. *Jones* (1848), 6 C. B. 81; 17 L. J. C. P. 206; 12 Jur. 657; 5 D. & L. 784.

(*c*) *In re Aykroyd* (1847), 1 Ex. 479 (decided under 9 & 10 Vict. c. 95, s. 63, which forbade the division of a cause of action). See sect. 81 of the County Courts Act, 1888, which contains a similar prohibition.

(*d*) *Lawford* v. *Partridge* (1857), 1 H. & N. 621; 26 L. J. Ex. 147; 3 Jur. N. S. 271.

(*e*) *Howard* v. *Graves* (1885), 52 L. T. 858; W. N. 113. See County Courts Act, 1888, s. 119. The reservation of the powers, rights and privileges of the judge of the City of London Court in sect. 35 of the County Courts Act, 1867, was held not to confer upon him any greater power over

Where a judge rescinded his judgment in the absence of one of the parties, it having been given in his presence (*f*);

Where a County Court judge inflicted a fine, with imprisonment in the alternative, for a contempt not committed *in facie curiæ* (*g*);

Where a second order of committal was made for non-payment of a debt under a judgment in respect of which a former order, already issued, was pending (*h*);

Where the judge has amended a plaint so as to turn it into one over which he has cognizance, when, in its original form, it disclosed no matter of complaint within his jurisdiction (*i*);

Where a plaintiff sought to make out a case over which a County Court had no jurisdiction, under colour of a plaint on which it might have it (*k*);

Where, on a claim for rent, conflicting evidence was given in defence which the judge rejected, but which clearly raised a question of title, and which, in consequence, he should have admitted, since, if admitted, it would have sufficiently raised a question of title to deprive him of jurisdiction, if *bonâ fide* (*l*);

Where a judge assumed jurisdiction, not by deciding

costs than that given to judges of County Courts. (*Howard* v. *Graves*, *supra*.) By the County Courts Act, 1888, s. 185, the City of London Court is, in effect, a County Court.

(*f*)——*Jones* v. *Jones* (1848), 5 D. & L. 628; 17 L. J. Q. B. 170. Such alteration cannot be made except by consent, or after a new trial. *Irving* v. *Askew* (1870), L. R. 5 Q. B. 208; 39 L. J. Q. B. 118; 18 W. R. 467. He is *functus officio*. Similarly, where a new trial has been once refused, the judge cannot afterwards grant one on changing his mind. *G. N. Railway* v. *Mossop* (1855), 17 C. B. 130; 25 L. J. C. P. 22; 2 Jur. N. S. 21.

(*g*) *Reg.* v. *Lefroy* (1873), L. R. 8 Q. B. 134; 42 L. J. Q. B. 121; 28 L. T. 132; 21 W. R. 332.

(*h*)——*Horsnail* v. *Bruce* (1873), L. R. 8 C. P. 378; 42 L. J. C. P. 140; 28 L. T. 705; 21 W. R. 597. For after making an order of commitment on a judgment debt the judge is *functus officio*, and cannot commit again, unless the debt is payable by instalments; in which case the debtor may be committed separately for default in each instalment. *Evans* v. *Wills* (1876), 1 C. P. D. 229; 45 L. J. C. P. 420; 34 L. T. 679; 24 W. R. 883.

(*i*) *Hopper* v. *Warburton* (1863), 32 L. J. Q. B. 104; 7 L. T. 722; 11 W. R. 384.

(*k*) *Hunt* v. *N. Staffordshire Railway* (1857), 2 H. & N. 451.

(*l*) *Mountnoy* v. *Collier* (1853), 17 Jur. 503; 1 E. & B. 630; 22 L. J. Q. B. 126, n.

conflicting facts, but on a wrong assumption as to a point of law (*m*) ;

Where the County Court judge wrongly decided that title to land did not come into question (*n*) ;

Where a tenant, under an agreement, was to pay 1*l.* weekly (thus making an annual rent of over 50*l.*), but in fact was permitted to pay only 16*s.*, and the judge tried the action (*o*) ;

Where an order of a County Court directed trustees under a will, who were strangers to the action, to pay money to a receiver, though the will directed otherwise (*p*) ;

Where a suit by the claimant in an interpleader was dismissed on account of the omission of his full name and address ; such omission not being sufficiently misleading to be within the rule (*q*) ;

Where the judge of his own accord, at the hearing, and without the consent of the defendant, amended the plaint so as to reduce the amount claimed to 50*l.*, and gave judgment for that amount (*r*) ;

(*m*) *Elston* v. *Rose* (1868), L. R. 4 Q. B. 4 ; 38 L. J. Q. B. 6 ; 17 W. R. 52 ; 19 L. T. 280 ; 9 B. & S. 509.

(*n*)—— *Thomson* v. *Ingham* (1850), 14 Q. B. 710 ; 19 L. J. Q. B. 189 ; 14 Jur. 429 : approved in *Elston* v. *Rose*, *ubi sup.*

(*o*) *Crowley* v. *Vitty* (1852), 7 Ex. 319 ; 21 L. J. Ex. 135.

(*p*) *Reg.* v. *Lincolnshire County Court* (1887), 20 Q. B. D. 167 ; 57 L. J. Q. B. 136 ; 58 L. T. 54 ; 36 W. R. 174. Pollock, B., refused to accept the contention that the High Court cannot interfere by prohibition, when once it is shown that there was jurisdiction, but that it was exceeded in consequence of the wrong construction of a document. Generally it is impossible to ascertain before the matter arises that there will be an excess of jurisdiction ; as, for instance, in a case in which title to land is involved, where the County Court judge cannot tell whether he has jurisdiction or not until the value of the land has been ascertained. The judge ought to go on with the inquiry till he has ascertained that, if he goes any further, he will exceed his jurisdiction, and then he ought to stop ; for if he goes further he will render himself liable to prohibition. A judge cannot give himself jurisdiction by construing an Act of Parliament wrongly.

(*q*)——*Ex parte McFee*, *Re Hardy* v. *Walker* (1853), 9 Ex. 261 ; 23 L. J. Ex. 57 : approving *Thomson* v. *Ingham* (1850), 14 Q. B. 710 ; 19 L. J. Q. B. 189 ; 14 Jur. 429, that a question like this cannot be conclusively determined by a County Court judge, but is subject to review.

Bunbury v. *Fuller* (1853), 9 Ex. 111 ; 23 L. J. Ex. 29.

(*r*)——*Hill* v. *Swift* (1855), 10 Ex. 726 ; 3 C. L. R. 724 ; 24 L. J. Ex. 137 ; 1 Jur. N. S. 167. The plaintiff must abandon the excess, not the judge : approving *Isaacs* v. *Wyld* (1851), 2 L. M. & P. 676 ; 7 Ex. 163 ; 21 L. J. Ex. 48 ; 15 Jur. 1135.

Where relief was wrongly granted under a counter-claim (*s*);

Where a person not entitled to apply to a County Court as a "person interested" under the Friendly Societies Act (*t*) was permitted to do so (*u*).

Prohibitions have been refused (*e.g.*) *in the following cases:*—

Where the matter was tried on evidence that could have been, but was not, questioned (*x*);

Where the rent payable as between the litigants was under the annual value allowed, although by a sub-lease a higher rent was paid (*y*);

Where the County Court judge decided, on conflicting evidence, a question of fact, even though his jurisdiction depended upon it (*z*);

Where defendant (in an action in the Mayor's Court) carried on business, and part of the cause of action arose within the City, and the amount claimed was under 50*l.* (*a*);

Where an officer of a County Court seized property to a greater amount than was necessary, the proceedings being in other respects in order (*b*);

Where a new summons had been issued bearing date of a prior but defective one, though the Statute of Limitations would have run against the plaintiff (*c*);

(*s*) *Davis* v. *The Flagstaff Mining Co.* (1878), L. R. 3 C. P. D. 228; 47 L. J. C. P. 503; 38 L. T. 769; 26 W. R. 431.

(*t*) 18 & 19 Vict. c. 63.

(*u*) ——*Hull* v. *McFarlane* (1857), 2 C. B. N. S. 796; 27 L. J. C. P. 41; 3 Jur. N. S. 1262.

Smith v. *Pryse* (1857), 7 E. & B. 339; 26 L. J. Q. B. 95; 5 W. R. 294; 3 Jur. N. S. 387.

(*x*) *Winsor* v. *Dunford* (1848), 12 Q. B. 603; 18 L. J. Q. B. 14; 12 Jur. 629.

(*y*) *Brown* v. *Cocking* (1868), L. R. 3 Q. B. 672; 37 L. J. Q. B. 250; 18 L. T. 360; 16 W. R. 933; 9 B. & S. 503. But the sublease would be strong evidence of a higher value.

(*z*) ——*Brown* v. *Cocking* (1868), *ubi sup.*: compare with

Joseph v. *Henry* (1850), 1 L. M. & P. 388; 19 L. J. Q. B. 369; 15 Jur. 104.

In *Pears* v. *Wilson* (1851), 6 Ex. 833; 2 L. M. & P. 515; 20 L. J. Ex. 381; 15 Jur. 932, where the question was whether certain money left under a will was a legacy or a trust, the High Court considered the question, and discharged a rule for prohibition, holding that the money was a legacy, and that therefore the County Court had jurisdiction.

(*a*) ——*Hawes* v. *Paveley* (1876), 1 C. P. D. 418; 46 L. J. C. P. 18; 34 L. T. 835; 24 W. R. 895.

Hawkins v. *Jeffreys* (1876), 34 L. T. 837.

(*b*) *Ex parte Summers* (1854), 18 Jur. 522; 2 C. L. R. 1284.

(*c*) *Foster* v. *Temple* (1848), 5 D. & L. 655; 17 L. J. Q. B. 230; 12 Jur. 654.

Where a new trial was sanctioned on account of defective service (*d*);

Where a summons had been served on a defendant residing out of the jurisdiction without the necessary leave, defendant having appeared (*e*);

Where the question of title to an office was not raised at the hearing, and the party was taken or admitted to be duly appointed (*f*);

Where, after commencement of an action in a County Court, the defendant had applied to the High Court to restrain the suit on the ground that the land, of which it was the subject, was above the limit of value, and the application was refused (*g*);

Where the cause of action was within the jurisdiction of the County Court, though the judge erroneously took other matters into consideration when assessing the damages (*h*);

Where the judge merely erred in the exercise of his powers, and did not exceed his jurisdiction (*i*);

Where the judge had, in fact, jurisdiction (*k*), however erroneous the decision (*l*), even though there were not a particle of evidence to support it (*m*);

Where an order made under the Debtors Act was informally drawn (*n*);

(*d*)——*Zohrab* v. *Smith* (1848), 5 D. & L. 635; 2 B. C. Rep. 231; 17 L. J. Q. B. 174; 12 Jur. 603.
Waters v. *Handley* (1848), 6 D. & L. 88.
(*e*) *Moore* v. *Gamgee* (1890), 25 Q. B. D. 44; 59 L. J. Q. B. 505; 38 W. R. 669; County Courts Act, 1888, s. 74.
(*f*)——*Stevenson* v. *Stickle* (1849), 13 Jur. 1103.
Gwynne v. *Knight* (1848), 1 Ex. 802; 17 L. J. Ex. 168.
So, where no objection was made to the interpretation of a statute;
Horne v. *Earl Camden* (1795), 2 Bl. 533.
(*g*) *Symons* v. *Rees* (1876), 1 Ex. D. 416; 25 W. R. 116.
(*h*)——*Chivers* v. *Savage* (1855), 5 E. & B. 697; 25 L. J. Q. B. 85; 2 Jur. N. S. 137: distinguishing
Jones v. *Currey* (1851), 2 L. M. & P. 474; 20 L. J. Q. B. 438; 15 Jur. 610.
(*i*)——*Still* v. *Booth* (1850), 19 L. J. Q. B. 521; 15 Jur. 577; 1 L. M. & P. 440. And
In re Bowen (1851), 15 Jur. 1196,
where Patteson, J., held that the mere misconstruction of a statute was not a ground for prohibition: and distinguished
Gould v. *Gapper* (1804), 5 East, 345; 1 Smith, 528.
(*k*)——*Toft* v. *Rayner* (1847), 5 C. B. 162.
Robinson v. *Lenaghan* (1848), 2 Ex. 333; 17 L. J. Ex. 174; 5 D. & L. 713; 12 Jur. 399.
(*l*) *Norris* v. *Carrington* (1864), 16 C. B. N. S. 10.
(*m*) *Lexden Union* v. *Southgate* (1854), 10 Ex. 201; 23 L. J. Ex. 316.
(*n*) *Harris* v. *Slater* (1888), 21 Q. B. D. 359; 57 L. J. Q. B. 539; 37 W. R. 56.

Where the bishop of the diocese was interested in the cause, that being no ground for prohibiting a cause before the Chancellor in the Consistory Court (*o*);

Where it was attempted, in an action under the Employers' Liability Act, to stay an action commenced in a County Court, by giving the notice, under sect. 39 of 19 & 20 Vict. c. 108, to remove the action into a superior Court (*p*);

Where the proper remedy was by way of appeal (*q*).

(*o*) *Ex parte Medwin* (1853), 1 E. & B. 609; 22 L. J. Q. B. 169; 17 Jur. 1178.

(*p*) *Reg.* v. *City of London Court* (1885), 14 Q. B. D. 905; 54 L. J. Q. B. 330; 52 L. T. 537; 33 W. R. 700.

(*q*) *Barker* v. *Palmer* (1881), 8 Q. B. D. 9; 51 L. J. Q. B. 110; 45 L. T. 480; 30 W. R. 59.

CHAPTER XVIII.

CERTIORARI.

Description.

A CERTIORARI is an original writ issuing out of the Queen's Bench or Chancery Division, directed in the king's name to the judges or officers of inferior Courts, commanding them to return the records of a cause depending before them, so that the party may have the more sure and speedy justice. The power to grant the writ is discretionary; and after its issue, all subsequent proceedings on the record in the Court below are erroneous (*a*).

Discretionary.

County Courts Act, 1888.

By the County Courts Act, 1888 (*b*), no judgment or order of any judge, nor any action or matter brought before him or pending in his Court, shall be removed by appeal, motion, *certiorari*, or otherwise, into any other Court whatever, save and except in the manner and according to the provisions of that Act.

Removal only under Act.

Sect. 126 enables the High Court, or a judge thereof (*c*), to order the removal into the High Court, by writ of *certiorari* or otherwise, of any action or matter commenced in the Court under the provisions of the Act, if he shall deem it desirable that it shall be tried in the High Court, and upon such terms as to payment of costs, giving security or otherwise, as he shall think fit to impose (*d*). That is, the Court may make the order at any time before the matter is finally disposed of, and even though its hearing has been commenced in the County Court (*e*).

The grant of an order or summons to show cause why a

(*a*) Bac. Abr., Cer.

(*b*) 51 & 52 Vict. c. 43, s. 124.

(*c*) ——Which, by Ord. LIV. r. 12, includes a Master. See also *Banks* v. *Hollingsworth*, (1893) 1 Q. B. 442; 4 R. 228; 62 L. J. Q. B. 239; 68 L. T. 477; 41 W. R. 225; 57 J. P. 436. *In re Bowen* v. *Evans* (1848), 3 Ex. 111; 5 D. & L. 193; 18 L. J. Ex. 38.

(*d*) 51 & 52 Vict. c. 43, s. 126.

(*e*) *In re East Dulwich, No.* 295, *Starr-Bowkett Building Society* (1890), 39 W. R. 32.

writ of *certiorari* should not issue to any Court, will operate as a stay of proceedings in the action or matter to which it relates, if the High Court or judge thereof so directs (*f*). And where a writ of *certiorari* to a Court shall have been granted on an *ex parte* application, the party obtaining it must lodge it with the Registrar and give notice to the opposite party that it has issued two clear days before the day fixed for the trial of the action or matter to which it relates, or he may be ordered to pay the costs (*g*).

When a writ of *certiorari* has been refused, no other Court or judge is to grant it; but the party may appeal from the decision, or apply again on different grounds (*h*).

Any action of replevin shall be removed into the High Court by writ of *certiorari*, if the defendant shall apply to the Court or a judge thereof for such writ, and give security (*i*).

And a judge of the High Court may order a writ of *certiorari* to issue to remove a judgment of a County Court exceeding 20*l.* into the High Court, if he is satisfied that the defendant has no goods or chattels which can conveniently be taken to satisfy it; and when removed it will have the same force and effect as a judgment of the High Court (*k*).

C. O. R., r. 28.

By the Crown Office Rules (*l*), applications for writs of *certiorari*, or for orders to remove indictments found at the assizes, into the Queen's Bench Division at the instance of any person other than the Attorney-General on behalf of the Crown, are, during the sittings, to be made to a Divisional Court of the Queen's Bench Division by motion for an order *nisi* to show cause; and in the vacation, or when there is no sitting of a Divisional Court, to a judge at Chambers (*m*), for a summons to show cause.

But where, from special circumstances, the Court or a judge is of opinion that the writ should issue forthwith, the order may be made absolute, or an order be made in the first instance, either *ex parte* or otherwise, as the Court or judge may direct.

Grounds of issue.

One ground upon which the Court will act in removing actions from inferior Courts is when it sees that difficult questions of law will probably arise at the trial (*n*). Another ground has relation to the character of the evidence necessary

(*f*) 51 & 52 Vict. c. 43, s. 129.
(*g*) *Ibid.* s. 130.
(*h*) *Ibid.* s. 132.
(*i*) *Ibid.* s. 137.
(*k*) *Ibid.* s. 151.
(*l*) C. O. R. 28.
(*m*) Or a Master. Ord. LIV. r. 12.
(*n*) *Longbottom* v. *Longbottom* (1852), 8 Ex. 203; 22 L. J. Ex. 74.

to support the case, as, for instance, if a considerable amount of expert evidence will have to be called (*o*).

There may be other grounds in each particular case, as, for example, the fact that the judge of the inferior Court has, in another but similar case, formed a certain view (*p*); or that the trial in a certain neighbourhood would be unfair to one of the parties (*q*).

Mayor's Court.

By clause 12 of the schedule to the Borough and Local Courts of Record Act, 1872 (which was applied to the Mayor's Court by Order in Council), "no action entered in the Court shall, before judgment, be removed or removable from the Court into any superior Court by any writ or process, except by leave of a judge of one of the superior Courts, in cases which shall appear to such judge fit to be tried in one of the superior Courts." And it was held that this clause imposed a limitation on the previous right of a defendant to have an action removed into the superior Court under the Mayor's Court Act, 1857, and gave power to the judge, in the exercise of his discretion, to order the removal of any such action, but subject to the condition precedent that the judge should first be satisfied that the action was fit to be tried in the superior Court, the expression "case fit to be tried in the superior Courts," meaning a case which "ought" to be tried there, or which is more fit to be tried there than in an inferior Court (*r*).

Appeal without leave from Divisional Court.

An appeal lies without leave from the decision of a Divisional Court upon a rule to show cause why a writ of *certiorari* should not issue (*s*).

Practice after transfer.

When an action or matter has been transferred to the High Court, the practice relating to it thereafter will be that by which matters in the High Court are regulated (*t*).

(*o*) *Potter* v. *G. W. Colliery Co.* (1894), 10 T. L. R. 380.
(*p*) *Ibid.*, per Lopes and Davey, L.JJ.
(*q*) *Bates* v. *Warner* (1889), 5 T. L. R. 582.
(*r*)——*Banks* v. *Hollingsworth*, (1893) 1 Q. B. 442; 4 R. 228; 62 L. J. Q. B. 239; 68 L. T. 447; 41 W. R. 225; 57 J. P. 436.
Cherry v. *Endean* (1886), 55 L. J. Q. B. 292; 54 L. T. 793; 34 W. R. 458.
(*s*) *Reg.* v. *Pemberton* (1879), 5 Q. B. D. 95; 49 L. J. M. C. 29; 41 L. T. 664; 28 W. R. 362; 44 J. P. 184.
(*t*) *Davies* v. *Williams* (1879), 13 Ch. D. 550; 49 L. J. Ch. 352; 42 L. T. 469; 28 W. R. 223.

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